Comptroller of the Currency
Administrator of National Banks

Fair Lending

Comptroller's Handbook

October 1997

CCE

Consumer Compliance Examination

Fair Lending Table of Contents

This booklet describes revised examination techniques for determining whether a bank is in compliance with the Equal Credit Opportunity Act (ECOA) and the Fair Housing Act (FH Act). It is being issued on an interim basis pending development of uniform examination procedures by the federal banking agencies.

Overview of Nondiscrimination Laws

The ECOA prohibits discrimination in any aspect of a credit transaction. It applies to any extension of credit, including those to small businesses, corporations, partnerships, and trusts.

The ECOA prohibits discrimination based on:
Race or color.

- Religion.
- National origin.
- Sex.
- Marital status.
- Age (provided the applicant has the capacity to contract).
- The applicant's receipt of income derived from any public assistance program.
- The applicant's exercise, in good faith, of any right under the Consumer Credit Protection Act.

The Federal Reserve Board's Regulation B, found at 12 CFR 202, implements the ECOA. Regulation B also creates specific consumer procedural rights, sets record keeping requirements, and describes other illegal limitations on credit. Official interpretations of the regulation are found in supplement I ("Staff Commentary") to 12 CFR 202.

The Fair Housing Act (FH Act) prohibits discrimination in any loan secured by residential real estate and in all aspects of residential real-estate related transactions, including, but not limited to:

- Making loans to buy, build, repair, or improve a dwelling.
- Purchasing real estate loans.
- Selling, brokering, or appraising residential real estate.
- Selling or renting a dwelling.

The FH Act prohibits discrimination based on:

- Race or color.
- National origin.
- Religion.
- Sex.
- Familial status (meaning that children under 18 years of age reside in the household, or that a member of the household is pregnant or in the process of securing custody of a child under 18).
- Handicap.

The U.S. Department of Housing and Urban Development's (HUD) regulation, 24 CFR 100, implements the FH Act.

Liability under these two statutes for discrimination on a prohibited basis is civil, not criminal. However, persons can be liable criminally under the FH Act for interfering with its enforcement, such as altering or withholding evidence or forcibly intimidating persons seeking to exercise their rights under the act.

Neither law uses the term "redlining." However, it is a violation of both statutes to refuse to lend in a particular geographic area on a prohibited basis because of the area's racial or ethnic composition.

Although ECOA prohibits discrimination on the basis of age in the extension of credit, lenders can legally favor "elderly" applicants. Regulation B defines "elderly" as 62 years old or older. Credit programs that offer preferential treatment to any age group under the age of 62 are prohibited. ECOA's non-discrimination provisions apply only to the extension of credit. Favorable terms based on age for bank services that are not related to credit, such as a "no-fee" checking account, are permitted.

Illegal Disparate Treatment

The most important elements of the fair lending examination procedures contained in this booklet outline the processes by which examiners determine whether illegal disparate treatment occurred. Examiners will ascertain the criteria for credit decisions; review loan files to determine the treatment various groups received in the underwriting process, the terms offered or given to applicants, or both; seek explanations from bankers, as appropriate; and evaluate those explanations. Examiners will streamline their examinations if an institution has disclosed voluntarily the results of a self-evaluation for possible lending discrimination and has performed the analysis competently to produce reliable results.

Legal and Illegal Disparate Treatment

For many reasons and circumstances, credit seekers or borrowers may get different results from or be treated differently by lenders. Most of those reasons and circumstances are not prohibited, so that there are numerous lawful reasons why an applicant from one race, gender, etc., might happen to be treated less favorably than one from another group. The nondiscrimination laws do not require uniform treatment of all customers.

Illegal disparate treatment exists when applicants are "similarly situated" (typically, similarly qualified, though factors other than qualifications may be relevant), but are treated differently on a prohibited basis. In fair lending reviews, examiners focus on whether the specific reason for which a prohibited basis group applicant was treated unfavorably appears to have been ignored for a favorably treated control group applicant who was no better qualified. That situation is termed "apparent disparate treatment," indicating that the actual situation may be different than it first appeared. "Apparent" is not a synonym for "obvious" or "blatant."

If the bank shows that, at the time of the credit decisions, it was aware of legitimate differences between the applicants that account for why one was treated more favorably than the other, the examiners will conclude that the applicants are not in actuality "similarly situated," so there was no illegal disparate treatment.

Influence of Prohibited Factors on Transaction

Generally, it is illegal to consider prohibited factors **in any way** in a credit transaction. The prohibition extends to attributes of the:

- Applicant, prospective applicant, or borrower.
- Persons associated with him or her.
- Neighborhood where property securing a mortgage loan is located.
- Residents or prospective residents of such property.

Evidence of Illegal Disparate Treatment

The existence of illegal disparate treatment may be established by statements revealing that the bank explicitly considered prohibited factors (**overt** evidence) or by differences in treatment that are not explained fully by legitimate factors (**comparative** evidence).

Forms of Illegal Disparate Treatment

Disparate treatment may occur prior to application or during underwriting or loan administration, or in setting loan prices, terms, and conditions. Examples are when a lender, selectively on a prohibited basis:

- Refuses to deal with people inquiring about credit.
- Discourages inquirers or applicants by delays, discourtesy, or other means.
- Provides different, incomplete, or misleading information about the availability of loans, application requirements, and processing and approval standards or procedures.
- Encourages or more vigorously assists inquirers or applicants.
- Discourages credit seekers by referring them to other lenders.
- Waives application procedures.
- States a willingness to negotiate.
- Fails to pursue information or verifications needed to complete an application.
- Uses different procedures or standards to evaluate applications.
- Uses different procedures to obtain and evaluate appraisals.
- Waives or grants exceptions to credit standards.

- Provides applicants opportunities to correct or explain adverse or inadequate information or to provide additional information.
- Accepts alternative proof of creditworthiness.
- Requires co-signers.
- Offers or authorizes loan modifications.
- Permits loan assumptions.
- Imposes late charges, reinstatement fees, etc.
- Initiates collection or foreclosure.

Disproportionate Adverse Impact

Sometimes, a lender applies a policy or practice equally to credit applicants that excludes or burdens applicants disproportionately on a prohibited basis. In certain circumstances, such an act may violate discrimination laws. Although the concept is well-established in discrimination law, the features of the law on disproportionate adverse impact as they apply to lending discrimination are not precise.

Several steps are required to prove lending discrimination using a disproportionate adverse impact analysis. The single fact that a policy or practice creates a disparity on a prohibited basis is **not** alone sufficient to prove a violation. The bank will be found to be in compliance when the policy or practice is justified by "business necessity," and no alternative would reduce the disproportion of the adverse impact and accomplish the same business purpose. The official staff commentary to Regulation B explains that this form of analysis is applicable to ECOA violations.

Other Illegal Limitations on Access to Credit

Regulation B (12 CFR 202) provides credit seekers with the:

- Right to have "protected income" included. According to section 202.6(b)(5), "A creditor shall not discount or exclude from consideration the income of an applicant or the spouse of an applicant because of a prohibited basis or because the income is derived from part-time employment or is an annuity, pension or other retirement benefit; a creditor may consider the amount and probable continuance of any income in evaluating an applicant's creditworthiness."

Furthermore, "when an applicant relies on alimony, child support, or separate maintenance payments in applying for credit, the creditor shall consider such payments as income to the extent that they are likely to be consistently made."

- *Right to apply individually.* Section 202.7(d) provides that generally "a creditor shall not require the signature of an applicant's spouse or other person, other than a joint applicant, on any credit instrument if the applicant qualifies under the creditor's standards of creditworthiness for the amount and terms of the credit requested."

- Right to have credit history information considered. According to section 202.6(b)(6), "To the extent that a creditor considers credit history in evaluating the creditworthiness of similarly qualified applicants for a similar type and amount of credit, in evaluating an applicant's creditworthiness a creditor shall consider:

  — The credit history, when available, of accounts designated as accounts that the applicant and the applicant's spouse are permitted to use and for which both are contractually liable.

  — On the applicant's request, any information the applicant may present that tends to indicate that the credit history being considered by the creditor does not accurately reflect the applicant's creditworthiness.

  — On the applicant's request, the credit history, when available, of any account reported in the name of the applicant's spouse or former spouse that the applicant can demonstrate accurately reflects the applicant's creditworthiness."

- Right not to have adverse action because of change in age or marital status. According to section 202.7(c)(1), "In the absence of evidence of the applicant's inability or unwillingness to repay, a creditor shall not [require reapplication, change the terms of the account, or terminate the account] of an applicant who is contractually liable on an existing open end account on the basis of the applicant's reaching a certain age or retiring or on the basis of a change in the applicant's name or marital status . . ."

- Right to have creditor exercise reasonable diligence in obtaining information needed to complete an application. According to section 202.2(f), the creditor must use "reasonable diligence" to obtain "the information that the creditor regularly obtains and considers in evaluating applications for the amount and type of credit requested (including, but not limited to, credit reports, any additional information requested from the applicant, and any approvals or reports by governmental agencies or other persons that are necessary to guarantee, insure, or provide security for the credit or collateral)."

- Right to have credit extended or continued, even if insurance is not available because of applicant's age. According to section 202.7(e), "A creditor shall not refuse to extend credit and shall not terminate an account because credit life, health, accident, disability or other credit-related insurance is not available on the basis of the applicant's age."

Key Technical and Procedural Legal Requirements

Regulation B (12 CFR 202) lists a number of clear requirements that do not directly involve access to credit or limitations related to prohibited bases. The following are important, because they create the records that support comparative file review for substantive violations and help consumers obtain their rights:

- *Written applications for real estate loans.* Section 202.5(e) provides that a creditor shall take written applications for mortgage loans to purchase or refinance a principal dwelling. The direct entry of information into a computer satisfies this requirement.

- Required monitoring information. Section 202.13 provides that for mortgage loans to purchase or refinance a principal dwelling, the lender must record the race or national origin, sex, marital status, and age of the applicants based on information provided by the applicant. The lender may use visual observation or applicant surname to determine race or national origin or sex, if the applicant does not provide the information.

- Statements of reason for adverse action. Section 202.9(a)(2) provides that generally, within 30 days of taking adverse action, a creditor must notify the customer of the adverse action. Such notification must be written and include either "a statement of specific reasons for the action taken" or "a disclosure of the applicant's right to a statement of specific reasons . . ."

  12 CFR 27 provides that banks subject to the Home Mortgage Disclosure Act (HMDA) must include reasons for denial on their Loan Application Register (LAR).

- Notice of right to appraisal report. Section 202.5a provides that a creditor that does not routinely provide copies of residential appraisal reports to applicants must give them written notice of their right to request copies of such reports from the creditor, and that, upon receiving a written request, creditors must mail such reports to the applicant within 30 days.

- Record retention. Section 202.12 provides that, for 25 months after notifying an applicant of action taken or that the application is incomplete, a creditor must retain the original or a copy of the application, any notice of action taken or notice of reasons for adverse action notice, and any written statement by the applicant alleging a violation of Regulation B. Also, if the creditor is not the one who issued the notice for the transaction, it must keep for 25 months from the date of **application** "all written or recorded information in its possession concerning the applicant."

Referral to DOJ or Notification to HUD

ECOA requires the OCC to refer matters to the Department of Justice (DOJ) "whenever the agency has reason to believe that one or more creditors has engaged in a pattern or practice of discouraging or denying applications for credit in violation of ECOA, section 701(a)."

Additionally, ECOA requires the OCC to notify the U.S. Department of Housing and Urban Development (HUD) whenever there is reason to believe that a violation of both ECOA and the FH Act has occurred that is **not**

referred to DOJ. Executive Order No. 12892 requires that HUD be notified "upon receipt of information . . . suggesting a violation" of the FH Act, and that such information also be forwarded to DOJ if it "indicates a possible pattern or practice." Procedures for preparing information for transmittal to DOJ or HUD are described in "Examiner and Supervisory Office Roles in the Enforcement Process" in the appendix.

- To appraise the quality of the bank's compliance management system for fair lending activities.

- To determine the reliance that can be placed on the bank's compliance management system, including practices and procedures performed by the person responsible for monitoring the bank's compliance with fair lending activities.

- To determine the bank's compliance with fair lending laws.

- To initiate corrective action when policies, practices, or procedures are deficient, or when violations of law or regulation are identified.

At a minimum, steps 1 through 8 must be performed in every fair lending examination.

1. Review the planning and strategy memorandum prepared after the previous examination by the examiner who completed the compliance management system program, as well as any other information that is pertinent to fair lending (historical examination findings, complaint information, and significant findings from compliance review/audit).

2. Confirm the appropriateness of the scope (product(s), decision center(s), time period, prohibited basis group(s), control group(s), and stage(s) of the lending process) selected to be examined by:

   a. Reviewing the examination scope guidelines in the appendix.

   b. Determining whether any information received in the response to the Request Letter (such as the HMDA-LAR or other estimate of application volume) or from other sources (such as consumer complaints) makes it appropriate to change the scope.

3. If credit scoring is used for any product within the proposed scope, see "Special Analyses" in the appendix.

4. Complete the "Checklist for Evaluating Fair Lending Compliance Management System" in the appendix for the transactions within the proposed scope, based on discussions with management and review of the following documents. Determine whether the bank's internal controls related to applying for, underwriting, or processing transactions within the scope and related to preventing, detecting, or correcting lending discrimination are adequate to ensure compliance in the fair lending area. Review:

   a. Organization charts.
   b. Process flowcharts.
   c. Policies and procedures.

d. Loan documentation and disclosures.
e. Computer programs.

5. Complete the "Checklist of Discrimination Risk Factors," incorporating information from the "Checklist for Evaluating Fair Lending Compliance Management System."

6. Continue with these examination procedures if the bank did not conduct a self-evaluation or if it conducted a self-evaluation but did not voluntarily disclose the results. If it voluntarily disclosed such results, evaluate their reliability and streamline the examination, if appropriate, using "Streamlining a Fair Lending Examination Based on a Bank's Self-Evaluation" in the appendix.

7. Determine whether the comparative file analysis should be conducted under the OCC's statistical modeling program rather than through judgmental comparison and interpretation by examiners.

   a. Ascertain whether the following conditions exist:

      - The bank reports HMDA data on the product to be reviewed.

      - The HMDA-LAR is automated and updated through the most recent quarter (as required by the OCC's Fair Housing Home Loan Data System regulation).

   b. Determine whether there were at least 50 control group approvals, 50 prohibited basis group approvals, 50 control group denials, and 50 prohibited basis group denials for the product to be reviewed during the most recent 12-month period for which the data in "a" are available (for example, a HMDA reporting year).

   c. If both conditions in "a" and the condition in "b" exist, consult the Community and Consumer Policy Division (CCP), which will confer with the Economics and Evaluation Division (E&E) about whether a statistical model should be used for the examination.

d. If a statistical model is used, steps 8 through 20 will be replaced by guidance provided to the examiners by CCP and E&E. If a statistical model is not used, proceed with the next step.

8. Determine the appropriate number(s) of applications to review by performing the following steps in sequence:

   a. Ascertain whether the following conditions exist:

      - The bank maintains an automated database for applications for the selected loan product for the transactions from a 12-month period to be reviewed (including, for the selected prohibited basis, information that can be used to sort the control group from the prohibited basis group). (NOTE: Typically, for race and national origin, this will be unavailable for non-HMDA products, unless Regulation B specifically permits or requires the information to be maintained. If the information is lawfully available, determine whether it is coded to permit automated sorting.)

      - The LAR (or equivalent non-HMDA database if there is one) is automated and updated through the most recent quarter.

   b. If both conditions exist, identify ways to rank, sort, or filter the automated database to facilitate selecting applicants with marginal qualifications — ones who were approved for a control group and ones who were denied for a prohibited basis group. Specify the characteristics of the approved and denied applicants that will be included in the sample. Parameters for denials might include denials only for selected reasons or denials with the lowest ratio of loan amount sought to income. Parameters for approvals in an approve/deny comparison might include loans whose amounts are at least 3 times income or whose processing time is more than 45 days. General parameters might include limiting the sample to transactions from only part of the previous 12 months, to residential transactions that are not “jumbo” loans, or to particular branches or geographies.

   c. Determine whether, within the parameters set by the examiners, there are at least 50 approved applicants from the control group and

50 denied applicants from the prohibited basis group for the approval/denial comparison, and like numbers for a terms/conditions/rates comparison.

d. If both conditions in "a" and the condition in "c" exist, forward the data on disk, tape, etc., along with any guidance developed for "b" above, to E&E. E&E needs 10 calendar days from its receipt of the request to produce lists of randomly selected denied prohibited basis, approved prohibited basis, and approved control group transactions for the sample, which then can be forwarded to the bank so that it can have the files available at the beginning of the on-site examination. Send CCP a copy of the transmittal memorandum.

   Consult with CCP as needed to complete the above process.

   When the sample is returned, proceed with step 9.

e. If one or more of the previous conditions does not exist:

   - Identify the sample size ranges using the sample size guide in the "Sampling Guidelines" in the appendix;
   - Within the ranges, specify the sample sizes based on estimated discrimination risk; and
   - Make the file request to the bank.

Transactional Testing

9. For each product to be examined, determine the bank's underwriting policies, practices, and standards and those for setting rates, terms, and conditions by interviewing appropriate bank personnel, using the "Underwriter Interview Guide" in the appendix. Use the underwriter's statements as a framework for evaluating any explanations offered later by the bank when it has been asked to account for apparent disparate treatment of the prohibited basis group and control group.

10. Set up a worksheet, computerized spreadsheet, or equivalent on which to record the file information needed for comparative analysis. Tailor it for the product(s) and prohibited basis to be reviewed to capture the information actually considered by the institution, particularly requirements or practices described by the underwriters (see example sections in "File Review Worksheet" in appendix).

11. If loan files lack data on applicants' qualifications or if the institution's standards are unclear:

    a. Ask what specific problems were the basis for the reasons (for denying applicants) cited on the notices of adverse action.

    b. Using specific approved applicants, ask how the institution determined that they differed from the denied applicants.

    c. Use informal file comments (if any) that characterize qualifications as good, adequate, weak, etc., as points of reference.

    d. Track whether credit decision makers evaluated the factor(s) identified in a-c consistently for the control and prohibited basis groups.

12. Meet with all examiners who will review files to ensure that a uniform understanding exists of the file items to be identified and recorded (for example, how credit report codes will be interpreted, how debt ratios will be calculated, including how income and monthly loan payments will be totaled, etc.).

13. Before reviewing files for comparative treatment of applicants:

    a. Review the "Other Explicit Illegal Limitations on Credit Checklist" to ensure that those types of substantive violations will be recognized, if encountered. (Do not complete checklists for individual transactions; complete one master checklist at the conclusion of the file review.)

    b. Review a denied consumer, business, and residential real estate loan application file against the "Technical and Procedural Compliance Checklist" (see appendix). Note any violations. During the comparative file review, observe whether the violations recur.

NOTE: If only rates, terms, and conditions are being compared, skip to step 19. The ranking, sorting, and filtering capabilities of an automated spreadsheet may also facilitate data organization and comparison tasks required in steps 14 to 20.

14. Review all the files of applicants from prohibited basis groups in the sample, and:

    a. Ask the bank to explain any reason for a denial stated in the adverse action notice that is not supported by facts in the file.

    b. Eliminate any prohibited basis applications with qualifications so weak that there are not likely to be any approved applicants with similar qualifications. For those applications, record only the name and/or number of the application, the disposition, and brief remarks describing the significant deficiencies.

    c. Record key data on the worksheet or spreadsheet prepared in step 10 for each denial that meets one or more of the criteria listed in "Marginal Transactions" in the appendix. When there is more than one reason for denial, but in each instance the applicant nearly meets the bank's standard, include the denial in comparisons for each reason.

    d. If rates, terms, and conditions will also be compared and if the denied files document terms, prices, and conditions offered, identify any of the customers from the prohibited basis group whose rates,

terms, or conditions differ unfavorably from policy or reflect unfavorable discretion by the loan officer. Consider:

- Pricing.
- Down payment.
- Fees.
- Maturity of loan or any other terms.
- Escrow, collateral, co-signers, or any other conditions.

If the denied prohibited basis files do not document that data or the number of denied prohibited basis files is small, obtain the data by reviewing a sample of approved loans to prohibited basis borrowers as provided in the "Sample Size" guide.

15. Identify "benchmarks" among the marginal applicants from the prohibited basis group who were denied. That is, for each reason for denial, identify the applicant whose qualifications were least deficient.

16. Review all of the approved control group applicant files from the sample, and:

    a. Eliminate approved, well-qualified control group applications (those without flaws or with flaws too minor to serve as a basis for denial). For such applications, record the name and/or number of the application, the disposition, and the key facts justifying the credit decision.

    b. Retain for later comparison all approvals that are marginal. (See "Marginal Transactions" in the appendix.)

    c. If there is also to be a comparison of loan rates, terms, and conditions, abstract data on these characteristics from the number of approved control group files specified in the "Sample Size Guide." All transactions, whether marginal or not, may be included.

17. To compare each marginal control group approval to the benchmarks identified in step 15 for applications from the prohibited basis group,

a. Identify every “overlap” (i.e., approval that appears to be no better qualified than a denial benchmark) for the reason for denial.

b. Abstract the data for those overlaps onto the worksheets or spreadsheet prepared in step 10.

18. For every denial reason for which an approved “overlap” exists, check the other marginal prohibited basis denials for the same denial reason to identify whether the “overlaps” identified in step 17 “overlap” them also.

NOTE: If the comparison is only of approve/deny decisions, skip to step 20.

19. To review loan rates, terms, and conditions for possible disparate treatment,

a. Obtain data on prohibited basis customers as called for in step 14d and control group customers required in step 16c, if not already performed.

b. Obtain explanations from the credit decision maker for any rates, terms, or conditions for customers from the prohibited basis group whose denials are identified in step 14d as differing unfavorably from policy or reflecting unfavorable discretion.

c. Determine whether, for similar credit, any control group customers in the sample received more favorable rates, terms, or conditions than customers from the prohibited basis group despite having certain characteristics as bad or worse than those cited by the bank to justify imposing unfavorable rates/terms/conditions on customers from the prohibited basis group.

d. If loan prices for applicants and borrowers from the prohibited basis group seem generally higher than those for the control group, compare the average prices of the two samples. Contact the lead compliance expert in the district to determine whether differences are significant and how to proceed.

20. Consider whether the files reviewed reveal any other conduct by the lender (that is, other than approve/deny and rates/terms/conditions

decisions) that appears to have occurred selectively on a prohibited basis (for example, treating files as "incomplete" or inviting explanations for delinquencies). Identify:

a. Every control group applicant who is treated more favorably and who appears to be no better qualified or eligible for such treatment than an applicant from the prohibited basis group.

b. Every applicant from the prohibited basis group who seems at least as well qualified or eligible for such treatment as a more favorably treated control group applicant.

c. Each applicant from the prohibited basis group who received conspicuously less favorable treatment by the bank than the bank stated was customary or required by policy.

d. Instances in which an applicant from the prohibited basis group was not afforded as much assistance or discretion as a control group applicant, despite deserving such treatment.

21. Present to the bank for explanation all instances of apparent disparate treatment identified in steps 17 through 20 (or through the statistical model).

a. Consider presenting the information in one of the formats in "Organizing Information from Comparative File Review" in the appendix.

b. Describe for management the types of information that would establish that the bank acted nondiscriminatorily.

c. State that the explanations and any supporting information will be considered by the examiners in determining whether to recommend to the supervisory office that the bank be found in violation of the appropriate fair lending law(s).

22 Document all explanations provided by the bank for apparent disparate treatment, not only its "best, final" response.

23 Evaluate the responses provided by the bank.

a. Consider whether the responses are consistent with previous statements, with information obtained from file review, with bank documents, and other sources, and with reasonable banking practices, and satisfy common-sense standards of logic and credibility.

b. Refer to "Evaluating Responses to Evidence of Disparate Treatment" in the appendix for discussions of common types of responses. Note that in most situations one type of explanation does not foreclose others, so that a bank may pursue multiple approaches to demonstrate that the appearance of disparate treatment is misleading.

c. Perform follow-up file reviews and comparative analyses, as necessary, to confirm the bank's explanations.

24. Document any overt evidence of disparate treatment (that is, any oral or written statement indicating that a prohibited factor affected any lending decision or may have discouraged potential customers).

a. Document whether the statement was known to lending staff and, therefore, likely to influence credit decisions and whether it was known to the public and, therefore, likely to discourage potential credit seekers in the prohibited basis group.

b. For a written policy, document:

- The concerns it raises about lending discrimination.
- The authority for the policy.
- How the policy is implemented.
- How widely the policy is applied.
- How strictly it is applied.

c. For an oral statement, document:

- The name and title of the person who made the statement, the time and date it was made, and what was said.

- The views or practices of employees other than the person who made the statement who have responsibilities in the are to which the statement applies.

- The information in a and b, if the statement is offered as the policy of the institution.

25. Discuss with appropriate bank personnel any overt evidence of disparate treatment documented in step 24 and include in the written report of the discussion dates, names, titles, questions, responses, any information that supports or weakens the banker's credibility, etc. (Refer to "Evaluating Responses to Evidence of Disparate Treatment" in the appendix for discussions of common types of responses.)

26. If, during the examination, pre-application screening, marketing practices, geographical limitations on credit availability ("redlining"), or disproportionate adverse impact from neutral practices are noted on a prohibited basis, review "Special Analyses" in the appendix. Document, as appropriate, the indications of such practices and obtain explanations from bank personnel.

27. Complete the "Other Explicit Illegal Limitations on Credit Checklist" in the appendix and obtain from the bank staff responsible for the transactions explanations for any violations found. Evaluate the explanation and verify any facts relied upon by the bank. Any instance (even isolated) not adequately explained must be treated as a violation. NOTE: Those violations do not require interpretation of the comparative treatment of applicants. Analysis involves only whether the bank treated applicants as explicitly required by law.

28. Complete the "Technical or Procedural Compliance Checklist" in the appendix. Determine whether any violations represent a pattern or practice. If so, determine their root causes and whether the violations are significant enough to merit bringing them to the board's attention. Discuss findings with management and obtain commitment(s) for corrective action.

29. Complete the "Summary of Lending Discrimination Review" in the appendix so that the scope and intensity of the comparative file review are documented.

30. If, at the end of the on-site examination, the bank's responses to apparent violations do not demonstrate that its actions had a nondiscriminatory basis:

    a. Review "Proof Standards for Violations and Referrals" and "Examiner and Supervisory Office Roles in Enforcement Process" in the appendix.

    b. Inform the district lead compliance expert of the situation. The compliance expert is encouraged to consult with CCP at this point.

    c. Inform bank management that the examiners will recommend that a violation be cited and that, if appropriate, a referral be made to DOJ or a notification to HUD.

    d. Inform bank management that the supervisory office will send the bank a letter summarizing the apparent violation(s) and advising that the bank has 30 days from the date of the letter to respond to the supervisory office before the district will act on the examiners' recommendation. Do not solicit corrective action for apparent violations or state whether any corrective action taken or proposed by the bank is sufficient.

    e. Complete the information listed in the "Components of Recommendation to Find Violations" in the appendix.

Conclusions

31. Summarize violations of law, regulation, or ruling using the following chart when making SMS entries. (Refer to EC 263 - SMS Documentation Policy.)

Citation	Department	Violation	Recommendation	Policy Guide	Reference
a. _____	__	__	__	__	__
b. _____	__	__	__	__	__
c. _____	__	__	__	__	__
d. _____	__	__	__	__	__
e. _____	__	__	__	__	__

32. If the violation(s) noted above involves discrimination or represents a pattern or practice, determine the root cause by identifying weaknesses in internal controls, compliance review, training, management oversight, or other factors. Consider whether civil money penalties (CMP), suspicious activity reporting, or enforcement action should be recommended (see CMP matrix).

33. Identify action needed to correct violations and weaknesses in the bank's compliance system, as appropriate. Form conclusions about the reliability of the compliance system for the area under review and provide them to the examiner performing the compliance management system program.

34. Determine in consultation with the EIC whether violations or deficiencies in the compliance system are significant enough to bring to the board's attention in the report of examination. If so, prepare items for inclusion under the heading "Matters Requiring Board Attention" and under a type 75 follow-up analysis.

35. Determine whether any items identified during this examination could materialize into a supervisory concern before the next on-site examination (consideration should be given to any planned increase in activity in this area, planned personnel changes, planned policy changes,

planned changes to outside auditors or consultants, and planned changes in business strategy, etc.). If so, summarize your concerns and assess the potential risk to the institution and discuss with the EIC, appropriate bank personnel, or both.

36. Discuss findings with bank management and obtain commitments to correct technical and procedural violations. However, do not discuss the appropriateness of corrective action for illegal discrimination.

Examination Scope Guidelines

Bank compliance with laws prohibiting illegal discrimination requires a systematic, sustained effort. A strategy for successive, complementary examinations (and other supervisory and advisory measures) is appropriate.

Examiners do not have to evaluate, in a single examination, compliance on every prohibited basis in every product in every underwriting center/subsidiary of the regulated entity. Neither do they have to assess possible racial or ethnic discrimination in conventional home purchase loans in every successive examination of the same bank.

The supervisory office should select one or more sites, markets, decision centers, products, prohibited bases, and stages of the lending process after considering whether:

- Reliable results can be obtained.
- Useful information will be available (that is, that will add significantly to the cumulative picture of whether the bank is complying with laws against discrimination).
- The choices are consistent with agency-wide priorities and the supervisory office's long-term strategy for evaluating whether that bank's lending activities conform to nondiscrimination requirements.
- The product(s), market(s), decision center(s), and stage(s) of the lending process are important to the institution.

Resources for determining the scope may include the memorandum of strategy and planning considerations prepared after the previous examination (as called for in step 19 in the "Compliance Management System" booklet), CRA performance evaluations, input from community contacts, consumer complaints, and the results of HMDA and demographic analyses (for example, CRAWiz). Community contacts should be made if it appears they can provide information to focus the examination.

Using the previous considerations, OCC supervisory offices may, at their discretion and, when appropriate, target banks for focused fair lending reviews.

Focus on Disparate Treatment

The typical fair lending examination must include comparative file review for possible illegal disparate treatment in underwriting practices or in setting loan terms and conditions for each product and prohibited basis selected. In a "comparative file review," prohibited basis group applicants treated unfavorably are compared with control group applicants treated favorably to learn whether the differences in treatment were justified by legitimate, nondiscriminatory factors. This approach may be applied even to validated credit scoring systems by using the guidance in the appendix on "Special Analyses."

The examination scope will not focus on possible discrimination in the pre-application process, marketing, or administration of a loan.

Generally, disproportionate adverse impact analysis should not be stressed in setting supervisory strategy or examination planning. The Community and Consumer Policy (CCP) Division will alert examiners and supervisory offices about types of policies and practices that raise concerns about disproportionate adverse impact. When examiners encounter policies (whether or not identified by the CCP) that raise disproportionate adverse impact considerations, they should follow the analysis described in these procedures and consult their lead expert.

Streamlining Fair Lending Examinations

If the bank discloses voluntarily the results of a self-evaluation for possible lending discrimination, examiners may be able to eliminate steps from the procedures for comparative file review. Review "Streamlining a Fair Lending Examination Based on a Bank's Self-Evaluation" in the appendix.

Product Selection

An OCC priority is the evaluation of whether racial or ethnic discrimination exists in residential lending. The planning of every scheduled compliance examination should consider initially whether there is a reasonable likelihood of obtaining a useful, reliable result by examining for illegal racial or ethnic discrimination in:

- Residential underwriting, or
- The rates, terms, or conditions of residential loans made.

However, residential lending need not be evaluated in every examination. The supervisory office's broad strategy should encompass compliance with nondiscrimination laws in consumer and small business lending by considering discrimination risk and potential usefulness and reliability of the comparative analysis. If the examination will include mortgage lending and if no specific rationale exists for selecting a particular loan type/purpose as defined in HMDA, conventional home purchase loans should be examined first, followed by conventional home-improvement loans, government-insured home purchase loans, government-insured home-improvement loans, conventional refinancings, government-insured refinancings, and multifamily loans.

Analysis of a nonresidential product is particularly appropriate, when:

- A comparative file review of any residential products would not be useful and reliable.
- Previous examinations have reviewed residential products without finding any indication of violations or weaknesses in the bank's compliance program.
- Examiners suspect discrimination in a specific **non**residential product.

Considerations in Selecting Control and Prohibited Basis Groups

At least five denied applications from the prohibited basis group and 20 approved applications from the control group are needed for a review of approve/deny decisions. At least five prohibited basis applications and 20 control group approvals are needed for a review of pricing and/or loan terms and conditions. If the product first selected does not have such volume, a higher-volume product should be chosen for review.

In establishing the control group, examiners must consider the racial, gender, age, etc., group, which is least likely to suffer inferior treatment. The fact that one group outnumbers another in the population or customer pool is not determinative.

Examiners must plan to compare only one prohibited basis group and one control group at a time so as to isolate prohibited factors. (For example, compare "black" to "white," not "minority" to "white"; compare "male" to "female," or "married" to "unmarried," not "married minority female" to "single white male.")

If the product lacks government monitoring information, but racial identifications could be inferred by using surrogates for racial or ethnic identity, such as surnames or geographical location of the property, the examiner should consult with the district lead compliance expert about how to proceed. The examiner should also consider evaluating possible marital status discrimination by comparing married co-applicants to unmarried co-applicants.

Bank or Corporate Organizational Considerations

In determining the scope of the examination, examiners should consider whether:

- Subsidiaries should be examined. The OCC will hold a national bank responsible for violations by its direct subsidiaries, but not typically for those by its affiliates (unless the affiliate has acted as the agent for the national bank or the violation by the affiliate was known or should have been known to the national bank before it became involved in the transaction or purchased the affiliate's loans). When seeking to determine the bank's relationship with affiliates that are not national banks, limit the inquiry to what can be learned in the national bank and do not contact the affiliate.
- The underwriting standards and procedures used in the entity being reviewed are used in related entities not scheduled for the planned examination. This will help examiners to recognize the potential scope of policy-based violations.
- The portfolio consists of applications from a purchased institution. If so, for scoping purposes, examiners should consider the applications as if

they were made to the purchasing bank. (For comparison purposes, applications evaluated under the purchased institution's standards should not be compared to applications evaluated under the purchasing institution's standards.)

- The portfolio includes purchased loans. If so, examiners should look for indications that the bank specified loans to purchase based on a prohibited factor or caused a prohibited factor to influence the origination process.
- A complete decision can be made at one of several underwriting or loan processing centers, each with independent authority. In such a situation, it is best to conduct on-site a separate comparative analysis at each underwriting center. If covering multiple centers is not feasible during the planned examination, examiners should review one during the planned examination and others in later examinations.
- Decision-making responsibility for a single transaction may involve more than one underwriting center. For example, the bank may have authority to decline mortgage applicants, but only the mortgage company subsidiary may approve them. In such a situation, examiners should learn which standards are applied in each entity and the location of records needed for the planned comparisons.
- Any third parties, such as brokers or contractors, are involved in the credit decision and how responsibility is allocated among them and the bank. The bank's familiarity with third party actions may be important, for a bank may be in violation if it participates in transactions in which it knew or reasonably ought to have known other parties were discriminating.

If the bank is large and geographically diverse, examiners should select only as many markets or underwriting centers as can be reviewed readily **in depth**, rather than selecting proportionally to cover every market. As needed, examiners should narrow the focus to the MSA or underwriting center that has the most discrimination risk factors (as shown on the "Checklist of Discrimination Risk Factors"). Examiners should use LAR data organized by underwriting center, if available. After calculating denial rates between the control group and minorities for the underwriting centers, examiners should select the centers with the highest disparities. If underwriting centers have fewer than five black, Hispanic, or Native American denials, examiners should not examine for racial discrimination. Instead, they should shift the focus to other loan products, prohibited bases, etc.

Sampling Guidelines

NOTE: Use these guidelines if one or more of the three conditions in step 8 for random sampling does not exist.

Establish the Volume of Applications

The examiner should use application volume for the preceding 12 months to determine how many files to review. Identify application volume by one of the following methods.

The HMDA-LAR. The LAR is a reliable tool for selecting samples to compare white, black, Hispanic, Native American, or Asian American applicants, or to compare male to female applicants. If the bank has a relatively low volume of HMDA-reported loans, base planning and file selection on its unsorted LAR; examiners can review it easily and count prohibited basis group denials.

If the bank has an established capability for automated sorting of its LAR (as most higher volume HMDA reporters do), examiners may request the bank to sort and organize a single LAR as described in the optional language in the "Sample Fair Lending Element of Request Letter" in the "Overview" and "Compliance Management Systems" booklets.

For each product on the LAR that has at least five denials in a single prohibited basis group (for example, Hispanics) and at least 20 control group approvals (the minimums stated in the "Sample Size Guide"), determine how many applications the bank received during the review period for the following:

- Approved control group (typically white, if the prohibited basis is race) applicants.

  The key source for these applications is transactions reported on the LAR as "originations" (HMDA-LAR "action taken" code 1). If few control group originations exist, include the following dispositions that reflect decisions by the bank to make the loan:

  - Applications listed in the LAR as "approved not accepted by applicant" (HMDA-LAR "action taken" code 2). NOTE: Confirm that this heading does not include applications for which the bank made a counteroffer that the applicant declined, which should be treated as denials.
  - Denials for failure to obtain private mortgage insurance (PMI) (HMDA "reason for denial" code 8).

- Denied prohibited basis group (typically either black, Hispanic, or Native American, if race is the prohibited basis) applicants for each prohibited basis group to be compared for each product to be reviewed.

- Approved prohibited basis group (typically either black, Hispanic, or Native American, if race is the prohibited basis) applicants (if the bank does not quote firm rates, terms, and conditions to applicants).

NOTE: Regardless of application or loan volume, any clear instance of apparent disparate treatment – even if the comparison consists only of two files – must be treated as a potential violation.

The loan trial balance. If a LAR is not available, the loan trial balance can be used to determine the number of loans made (though not denials).

Estimates from the bank. If there is no LAR for the product, the bank may have estimates of the numbers of approvals and denials for each product that might be appropriate for comparative analysis during the scheduled examination. For example, examiners can request estimates of the numbers of minority denials of conventional home purchase loans. The bank should be capable of providing (by hand counts, if necessary) application and loan volumes by race, ethnicity, or gender for purchase and refinance loans (for which Regulation B requires monitoring information to be kept). If it is not clear whether there are at least five prohibited basis home purchase loan denials and 20 control group approvals, examiners should prepare for both a residential and a nonresidential product examination. Examiners should request the bank to have available on-site all home purchase loan applications, preferably with approvals and denials sorted.

Set the Sample Size

Examiners should use the "Sample Size Guide" combined with the application volume data to establish the sample size. If discrimination risk as documented in the "Checklist of Discrimination Risk Factors" is high, select sample sizes high in the appropriate ranges in the guide; if discrimination risk is low, select sample sizes low in the appropriate ranges in the guide.

Specify the Files to Review

Once the sample size is decided, the examiner should consider the following in choosing the files to review:

- Applications for a portion of the previous 12 months rather than the entire period.
- Applications for smaller (other than "jumbo") residential loans.
- Approvals with the highest ratio of loan amount sought relative to income.
- Approvals with the longest processing times.
- Denials only for selected reasons.
- Denials with the lowest ratio of loan amount to income.
- Denials involving questionable circumstances, if these can be identified (for example, denial one day after application because "unable to verify").

FAIR LENDING SAMPLE SIZE GUIDE

NOTE: Do not use this guide to evaluate credit scoring systems or voluntarily disclosed self-evaluation results. Instead, see "Streamlining a Fair Lending Examination Based on a Bank's Self-Evaluation" and guidance on credit scoring in "Special Analyses" in the appendix.

Approve/Deny Comparison

	Denials for *each* prohibited basis group being compared			**Approvals for the control group** [a]		
Product volume	[b]-50	51-150	>150	20[b]-50	51-250	>250
Minimum review[c]	All	51	75	20	51	100
Maximum review	50	100	150	Smaller of 50 or 5x denial sample[d]	Smaller of 125 or 5x denial sample[d]	Smaller of 300 or 5x denial sample[d]

Terms/Conditions/Rates Comparison

	Approvals for *each* prohibited basis group being compared [e]			**Approvals for the control group** [a]		
Product volume	[b]-25	26-100	>100	20[b]-50	51-250	>250
Minimum review[c]	All	26	50	20	40	60
Maximum review	25	50	75	Smaller of 50 or 5x denial sample[d]	Smaller of 75 or 5x denial sample[d]	Smaller of 100 or 5x denial sample[d]

FAIR LENDING SAMPLE SIZE GUIDE

Notes

[a]If both approve/deny decisions and terms/conditions/rates are being compared, use the same control group approvals for both comparisons.

[b]If there are fewer than this many transactions, review a different product.

[c]Select a sample size between the minimum and maximum based on discrimination risk as documented on the "Checklist of Discrimination Risk Factors." Once the sample size is set, select the transactions themselves judgmentally:

(1) from the HMDA-LAR or equivalent (if there is one) either manually or according to criteria implemented through automated sorting, screening, ranking, etc., or

(2) if there is no LAR or equivalent, manually from transaction files in the bank.

For an approve/deny comparison, quickly review files to identify marginally qualified applicants, then abstract detailed information only from certain marginal applications onto paper worksheets or an automated spreadsheet. (Sample sizes for terms/conditions/rates comparisons are smaller because there is no subsequent reduction to marginals. Try to select the sample from a narrow time period.)

[d]If two prohibited basis groups (for example, black and Hispanic) are being compared with one control group, use 5 times the larger prohibited basis group sample.

[e]If terms/conditions/rates quoted to denied applicants from the prohibited basis group are documented in the files, compare the approved and denied transactions already selected instead of additional transactions from this part of the table.

Checklist for Evaluating Fair Lending Compliance Management Systems

When and How to Use This Checklist

- When compliance information about the product to be examined is received in response to the request letter, enter that information on relevant portions of the checklist.
- When interviewing the compliance officer, use the checklist to structure the interview and record information about the compliance management systems for fair lending.
- Use this information to help complete the "Discrimination Risk Factors Checklist" in the appendix.
- Do not use this checklist in community banks; the OCC's emphasis is on actual practices, not systems, in community banks.

Compliance Program: Are There Policies and Procedures That Tend to Prevent Illegal Disparate Treatment?

Mark the box if the answer is "yes" for the transactions within the scope:

- Lending practices and standards:

- Are underwriting practices clear and similar to industry standards?
- Is pricing within reasonably confined ranges with guidance linking variations to risk and cost factors?
- Does management monitor the nature and frequency of exceptions to its standards?
- Are denial reasons communicated accurately and promptly to unsuccessful applicants?

- Do training, application-processing aids, and other guidance describe:

- Prohibited bases under ECOA, Regulation B, and the Fair Housing Act?

☐ Other substantive credit access requirements of Regulation B (e.g., spousal signatures, improper inquiries, protected income)?

- Is it specifically communicated to employees that they must not, on a prohibited basis:

  - ☐ Refuse to deal with people inquiring about credit?
  - ☐ Discourage inquirers or applicants by delays, discourtesy, or other means?
  - ☐ Provide different, incomplete, or misleading information about the availability of loans, application requirements, and processing and approval standards or procedures (including selectively informing applicants about certain loan products, while failing to inform them of alternatives)?
  - ☐ Encourage and more vigorously assist inquirers or applicants?
  - ☐ Refer credit seekers to other lenders?
  - ☐ Waive application procedures?
  - ☐ State a willingness to negotiate?
  - ☐ Use different procedures or standards to evaluate applications?
  - ☐ Use different procedures to obtain and evaluate appraisals?
  - ☐ Waive or grant exceptions to credit standards?
  - ☐ Provide applicants with opportunities to correct or explain adverse or inadequate information, or to provide additional information?
  - ☐ Accept alternative proof of creditworthiness?
  - ☐ Require co-signers?
  - ☐ Offer or authorize loan modifications?
  - ☐ Permit loan assumptions?
  - ☐ Impose late charges, reinstatement fees, etc.?
  - ☐ Initiate collection or foreclosure?

- Has the bank taken specific initiatives to prevent forms of unintentional discrimination, including employees':

  - ☐ Basing credit decisions on assumptions derived from racial, gender, and other stereotypes, rather than facts?
  - ☐ Because of their personal comfort or preference, seeking customers from a particular racial, ethnic, or religious group, or of a particular gender, to the exclusion of other types of customers?
  - ☐ Because of their discomfort or unease in dealing with customers from certain racial, ethnic, or religious groups, or of a certain gender, limiting the exchange of credit-related information or their effort to qualify the applicant?

- Is the bank's market or service area drawn without unreasonably excluding identifiably minority areas?

- Does the bank ensure that it does not:

  - ☐ State racial or ethnic limitations in advertisements?
  - ☐ Employ code words in advertisements that convey racial or ethnic limitations?
  - ☐ Place a series of advertisements that a reasonable person would find to indicate minority customers are less desirable?
  - ☐ Advertise only in media serving areas of the market other than minorities?
  - ☐ Use other forms of marketing only in nonminority areas of the market?
  - ☐ Market only through brokers known to serve only one racial or ethnic group in the market?
  - ☐ Use a prohibited basis in any pre-screened solicitation? (Under the Federal Reserve Board's current interpretation of Regulation B, this practice would not constitute a violation of ECOA. However, the practice should be noted because a private plaintiff might persuade a court to treat the practice as an ECOA violation; if the product involved residential real estate, the practice would violate the FH Act; and such a preference might be valuable in interpreting whether other conduct constitutes illegal discrimination.)

Compliance Audit Function: Does the Bank Attempt to Detect Prohibited Disparate Treatment by Self-Evaluation?

NOTE: Do not request the results of self-evaluations. The following items are intended to obtain information about the bank's approach for self-evaluation, not its findings. Evaluating the voluntarily disclosed results of self-evaluations is described in "Streamlining a Fair Lending Examination Based on a Bank's Self-Evaluation" in the appendix.

Mark the box if the answer is "yes" for the transactions within the scope.

- Are the transactions reviewed by an independent analyst who:

- ☐ Is directed to report objective results?
- ☐ Has an adequate level of expertise?
- ☐ Produces written conclusions?

- Does the bank's approach for self-evaluation call for:

  - ☐ Attempting to explain major patterns shown in the HMDA data?
  - ☐ Determining whether actual practices and standards differ from stated ones and basing the evaluation on the actual practices?
  - ☐ Evaluating whether the reasons cited for denial are supported by facts relied on by the decision maker at the time of the decision?
  - ☐ Comparing the treatment of prohibited basis group applicants to control group applicants?
  - ☐ Obtaining explanations from decision makers for any unfavorable treatment of the prohibited basis group that departed from policy or customary practice?
  - ☐ Covering significant decision points in the loan process where disparate treatment might occur, including:

    - ☐ The approve/deny decision?
    - ☐ Pricing?
    - ☐ Other terms and conditions?

  - ☐ Covering at least as many transactions as examiners would independently, if using the OCC's "Fair Lending Sample Size Guide" for a product with the application volumes of the product to be evaluated?

- In the bank's plan for comparing the treatment of prohibited basis group applicants with that of control group applicants:

  - ☐ Are control and prohibited basis groups based on a prohibited basis found in ECOA or the FH Act and defined clearly to isolate that prohibited basis for analysis?
  - ☐ Are appropriate data to be obtained to document treatment of applicants and the relative qualifications vis-a-vis the requirement in question?
  - ☐ Are the data to be obtained the data on which decisions were based, not later or irrelevant information?

- ☐ Does the plan call for comparing the denied applicants' qualifications related to the stated reason for denial with the corresponding qualifications for approved applicants?
- ☐ Are comparisons designed to identify instances in which prohibited basis group applicants were treated less favorably than control group applicants who were no better qualified?
- ☐ Is the evaluation designed to determine whether control and prohibited basis group applicants were treated differently in the processes by which the bank helped applicants overcome obstacles and by which their qualifications were enhanced?
- ☐ Are responses and explanations to be obtained for any apparent disparate treatment on a prohibited basis or other apparent violations of credit rights?
- ☐ Are reasons cited by credit decision makers to justify or explain instances of apparent disparate treatment to be verified?

What Provisions Exist for Corrective Action by the Bank?

- Who is to receive the self-evaluation results?
- What decision process is supposed to follow delivery of the information?
- Is feedback to be given to staff whose actions are reviewed?
- What types of corrective action may occur?
- Are customers to be:

  - ☐ Offered credit if they were improperly denied?
  - ☐ Compensated for any damages, both out of pocket and compensatory?
  - ☐ Notified of their legal rights?

- Other corrective action

  - ☐ Will institutional policies or procedures that may have contributed to the discrimination be corrected?
  - ☐ Will employees involved be trained or disciplined?
  - ☐ Should the bank consider the need for community outreach programs, changes in marketing strategy or loan products, or both, to better serve minority segments of its market?
  - ☐ Will audit and oversight systems be improved to ensure there is not recurrence of any identified discrimination?

Checklist of Discrimination Risk Factors

When and How to Use This Checklist

- Use the checklist as a planning aid to help identify facts and issues, not as a scorecard.
- Use discrimination risk to set a sample size, within the range in the "Fair Lending Sample Size Guide," appropriate for the volume of applications for the product.
- Identify the number and seriousness of the risk factors for each product being considered for the lending discrimination review.
- Do not use this list to estimate the bank's legal liability or CRA performance.

Discrimination Risk Factors

The presence of the following characteristics indicates potential for discrimination in a product (or bank). Check the box if the factor is present for the product to be reviewed:

- ☐ The completed "Fair Lending Compliance Management System Checklist" shows that the bank's systems to prevent illegal discrimination are inadequate. NOTE: Do not complete the compliance checklist in community banks.
- ☐ The bank's internal compliance monitoring does not use a comparative analysis approach that the examiners have reviewed and found to be sound. NOTE: Do not consider this factor in community banks.
- ☐ The area(s) where the product is marketed offers a potential flow of racial minority applicants.
- ☐ The bank's HMDA data (or similar data) for the product show unusually high disparities in denial rates between white applicants and racial minority applicants, or between male and female applicants.
- ☐ Fair lending problems were found previously in one or more of the bank's other products.
- ☐ Data and record keeping problems compromised the reliability of an earlier lending discrimination review of the product.
- ☐ Other regulatory or enforcement agencies have provided the OCC with evidence of possible illegal discrimination at the bank.

- ☐ Persistent, specific allegations of illegal discrimination, such as administrative complaints filed with government agencies, have been made against the bank.
- ☐ The bank's overall compliance rating is weak.
- ☐ The bank has not made adjustments to keep up with the state of the art for an institution of its size to ensure compliance with nondiscrimination laws.
- ☐ The product is nontraditional or new.
- ☐ The loan decision process for the product is complex.
- ☐ Underwriting standards for the product are vague or unusual.
- ☐ There is broad discretion in pricing and setting other terms and conditions for the product, and pricing, terms, and conditions are not linked clearly to credit risk factors.
- ☐ Transaction files for the product do not include applicants' qualifications and deficiencies supporting loan decisions.
- ☐ The bank does not promptly, routinely communicate accurate, specific denial reasons to unsuccessful applicants.
- ☐ The bank does not monitor exceptions to its standards for the product.
- ☐ Required monitoring information on prohibited basis groups is not obtained routinely.
- ☐ The bank's training, application-processing aids, and other staff guidance do not address nondiscrimination requirements of ECOA, Regulation B, and the Fair Housing Act, other substantive credit access requirements of Regulation B (for example, spousal signatures, improper inquiries, protected income), and potential forms of unintentional discrimination.
- ☐ The bank's market or service area unaccountably omits local racial or ethnic minority areas.

Streamlining a Fair Lending Examination Based on a Bank's Self-Evaluation

As part of their compliance audit function, some banks may perform reviews or "self-assessments" to detect possible lending discrimination. The OCC has classified such self-assessments into two types, "self-evaluations" of the institution's actual transactions and "self-testing" ("mystery shopping") to monitor treatment of potential applicants. OCC examiners must not ask whether banks have carried out "self-testing" or request them to disclose the results of "self-evaluations." However, voluntarily disclosed results of self-evaluations may serve as the basis for streamlining examinations. (For additional background, see "Self-Assessments by National Banks – OCC Policy" in the appendix.)

Verifying the Bank's Self-Evaluation

If the institution has disclosed voluntarily the results of a self-evaluation, answer the following numbered questions.

If the answers to questions 1 and 2 (relating to scope) are both "yes," each successive "yes" answer to questions 3 through 12 (relating to technique) indicates that the bank's work up to that point can serve as a basis for streamlining the examination.

If the answer to either questions 1 or 2 is "no," the self-evaluation cannot serve as a basis for streamlining the examination. However, examiners should still evaluate the self-evaluation to the degree possible in light of the remaining questions and communicate the findings to the bank so that it can improve its self-evaluation process.

1. Did the transactions covered by the self-evaluation occur within two years previous to the examination? Incorporate results only from transactions in the most recent two years.

2. Did it cover the same product, prohibited basis, decision center, and stage of the lending process (for example, underwriting, setting of loan terms) as the planned examination?

3. Did the self-evaluation include comparative file review? **NOTE**: One type of "comparative file review" is statistical modeling to determine whether similar control group and prohibited basis group applicants were treated similarly. If a bank offers self-evaluation results based on a statistical model, the examiner must:

   - Inform district management, which must confer with the Community and Consumer Policy Division (CCP). CCP, the Economics and Evaluation Division (E&E), or the two divisions working together will arrange for the bank's self-evaluation results to be assessed.

   - Obtain answers to questions 4 and 6.

   - Follow guidance from CCP based on E&E's evaluation of the reliability of the bank's statistical model.

4. Were control and prohibited basis groups defined accurately and consistently with ECOA and/or the FH Act?

5. Were the transactions for the self-evaluation chosen to focus on marginal applicants (or, if not, at least, selected randomly)?

   [To answer questions 6 and 7, review 10 percent (but not more than 50) of the transactions covered by the self-evaluation for the control group and each prohibited basis group. For example, if the institution's self-evaluation reviewed 250 white and 75 black transactions, plan to verify the data for 25 white and seven black transactions.]

6. Were the data abstracted from files accurate? Were those the data available to the credit decision makers at the time of the decisions?

7. Did the 10 percent sample reviewed for question 6 also show that any customer assistance and lender judgment that helped applicants to qualify were documented in the self-evaluation accurately and systematically and were compared for differences on the prohibited basis?

8. Were prohibited basis group applicants' qualifications related to the requirement in question compared with corresponding qualifications of

control group approvals? Specifically, for self-evaluations of approve/deny decisions, were the denied applicants' qualifications related to the stated reason for denial compared with the corresponding qualifications for approved applicants?

9. Did the self-evaluation sample cover as many control and prohibited basis group transactions as the examiners would have reviewed using the "Sample Size Guide" in the appendix?

   The "Sample Size Guide" sets the numbers of files that should be quickly reviewed to separate transactions that are marginal from those that are not. (Neither the examiners nor the bank are expected to analyze every file in the sample in detail.)

   If the bank's samples are significantly smaller than those in the "Sample Size Guide," but its methodology otherwise is sound, the examiners should review additional transactions, until the numbers of control group and prohibited basis group transactions reviewed altogether in the self-evaluation and by the examiners equal the minimums on the "Sample Size Guide." The examiners should review the additional transactions using the file review steps in these procedures — that is, a quick first review to select marginal transactions, identification of "benchmarks" and "overlaps" (encompassing both the bank's and the examiners' data), and abstracting of detailed data only from certain marginal files.

10. Did the self-evaluation accurately identify all instances in the sample in which prohibited basis group applicants were treated less favorably than control group applicants who were no better qualified? If there were no such instances, incorporate the findings of the self-evaluation into the examination findings and indicate that those findings are based on verified data from the bank's self-evaluation.

11. Were explanations solicited for such instances from the persons responsible for the decisions?

12. Were the reasons cited by credit decision makers to justify or explain instances of apparent disparate treatment supported by facts or reasoning of the type deemed legitimate and persuasive in "Evaluating Responses to Evidence of Disparate Treatment" in the appendix?

Streamlining the Scheduled Examination

If all of the previous questions are answered "yes," incorporate the findings of the self-evaluation (whether supporting compliance or violations) into the examination findings. Indicate that those findings are based on verified data from the bank's self-evaluation.

If not all of the questions in the previous section are answered "yes," resume the examination procedures at the point where the bank's reliable work would not be duplicated by the examiners. In other words, use the reliable portion of the self-evaluation and correspondingly reduce independent comparative file review by examiners. For example, if the bank conducted a comparative file review that compared applicants' qualifications without considering the reasons they were denied, the examiners could use the qualification data abstracted by the institution (if accurate), but would have to construct independent comparisons of the same transactions structured around the reasons for denial.

NOTE: If a bank that carried out several self-evaluations with comparative file review provides the results of some and withholds the results of others, examiners should consider revising the scope to focus on one of the products and/or decision centers for which results were withheld.

Evidence of Violations

If the bank's self-evaluation identified potential violations, examiners should attempt to verify them. If the violations are verified, document fully how the potential violations were identified and verified and prepare to forward the information to be considered for appropriate enforcement. (Consult "Examiner and Supervisory Office Roles in Enforcement Process" and "Components of Recommendation to Find Violation" in the appendix.) The results of voluntarily disclosed self-evaluations are not exempt from legal requirements that the OCC refer fair lending violations to DOJ and/or notify HUD. Contact the supervisory office, EIC, lead expert, district counsel, and CCP.

Do not, at this time, suggest corrective action to the bank or characterize its corrective actions to date as adequate or inadequate. Document whether any corrective action by the bank alleviated the violations. Particularly note whether the bank responded to any potential violations it identified as called for in the "Interagency Policy Statement on Discrimination in Lending" (OCC 94-30), question 6, including, but not limited to:

- Identifying customers whose applications may have been inappropriately processed, offering to extend credit if they were improperly denied; compensating them for any damages, both out of pocket and compensatory; and notifying them of their legal rights.
- Correcting any institutional policies or procedures that may have contributed to the discrimination.
- Identifying and training and/or disciplining the employees involved.
- Considering the need for community outreach programs and/or changes in marketing strategy or loan products to better serve minority segments of the lender's market.
- Improving audit and oversight systems to ensure that the discrimination does not recur.

Consider whether the effectiveness of corrective action has been compromised by any delay by the bank in taking it or by other significant delay between the identification of the problem and its correction or disclosure.

Underwriter Interview Guide

For each product to be examined, determine who best can respond to questions on underwriting policy, practices, and standards. Interview that person using the underwriter interview guide to determine the considerations that go into decisions to approve or deny applications and into setting rates, terms, and conditions for loans.

- Generally, do not request the bank to complete the interview guide in advance and submit it to the examiners.
- The chief objective of the interview is to obtain a "user's" perspective on the written lending guidance and understand how discretion, flexibility, creativity, and other dynamic elements operate in the loan process. Particularly, determine how loan officers are supposed to react when debt ratios, poor credit, or other potential reasons for denial become obstacles for the applicant. Note whether the interviewee's statements are based on formal policy or informal practices. Examiners' notes on this meeting will become a part of the work papers.
- Before starting to review files, review with the underwriter several approved, denied, and withdrawn files and the form(s) of credit report used. If not already known, learn whether the rates, terms, and conditions quoted to denied applicants are firm and can be used as the basis for comparing terms and conditions.
- For examinations of nonresidential products, select appropriate questions from the interview guide and omit those not relevant to the product to be reviewed.
- If the bank uses credit scoring for the product, use this interview guide to identify aspects of the application and data entry processes where judgment plays a role and to explore the potential for comparisons that focus on those processes.

Underwriter Interview Guide Questionnaire

Bank Name: Examiner:
Exam Date: Product:

As necessary, ask follow-up questions until it is clear how requirements or procedures will apply to the files to be examined, until the rationales for unusual policies are understood, etc. *Items in italics are potential violations if not carried out as prescribed in Regulation B.*

GENERAL	
1. Obtain from the chief underwriter an overview of the underwriting procedures and standards. Obtain copies of policies, procedures, standards, etc. (Need not be retained.)	
2. Obtain any exceptions report maintained on loans approved despite failing to meet requirements. Learn who approves exceptions.	
3. How does the bank ensure that all information related to an application for credit is retained for 25 months after notifying the applicant of action taken, pursuant to Section 202.12(b) of Regulation B?	
4. Find out if a credit-scoring system is used. If so, obtain any vendor certification and any guidance about the system. Obtain a list of overrides.	
For all the items below, ascertain changes in practices and standards during the period being examined.	
5. Obtain copies of any consumer guidance on the loan process or how to develop a viable application.	

6. Obtain copies of any checklists, log sheets, or other loan-processing aids used by bank personnel.	
CREDIT HISTORY	
7. Review with the underwriter a copy of each type of credit report used. Obtain copies of any code sheets or other guidance on using the credit report(s).	
8. At what stage of the transaction is a credit report obtained?	
9. Does the bureau send a copy of the report (or abstract) to consumers? Obtain a copy of the transmittal letter.	
10. Does the bank require that corrected information come from the bureau, or will it accept corrected information directly from the customer?	
11. What constitutes a sufficient credit history on which to make a decision?	
12. Is a minimum number of accounts reported required?	
13. A minimum length of reported credit history?	
14. Has the bank made loans to persons who did not meet these standards?	
15. In such a case, what evidence of creditworthiness substituted for the bureau report?	

16. How does the bank evaluate information an applicant asks be considered to explain or correct inaccurate credit information from another source?	
17. How does the bank evaluate joint spousal accounts when a married person applies for individual credit?	
18. Does the bank treat unmarried co-applicants the same as married ones in terms of evaluating their creditworthiness?	
19. How does the bank evaluate accounts held jointly with a former spouse that an applicant for individual credit asks to be considered to show his or her own creditworthiness?	
20. What deficiencies would cause denial?	
21. Does a mortgage payment defect negate otherwise good credit? Does a good mortgage payment record offset other credit defects?	
22. How far into the past is derogatory information relevant?	
23. Does it matter if the debt has been paid?	
24. Is minor derogatory information ignored? What kinds?	

25. Does the bank solicit explanations? In which circumstances and which not? Obtain the form of letter to the applicant, if one exists. If the mode of contact is by phone rather than letter, are these noted in the file?	
26. What constitutes a "good" explanation?	
27. Is the failure to disclose serious derogatory information on the application fatal?	
28. Is derogatory information associated with a medical problem in the applicant's household treated differently than other derogatory information?	
29. How does the bank view judgments, repossessions, and collections?	
30. Under what circumstances would the bank lend to a customer with a bankruptcy in his or her record?	
31. How does the bank view inquiries? Would the bank ever deny a loan solely on the basis of inquiries?	
FUNDS TO CLOSE	
32. What items must be covered by funds for closing?	
33. How many months of cash reserves are needed?	
34. When are funds from undocumented sources acceptable?	

35. Are applicants with inadequate or marginal cash to close advised how gift funds may be applied?	
36. Are grants as acceptable as gifts? From what sources?	
37. How does the bank assure that applicants are uniformly advised of this?	
38. May family or household cash be pooled for closing?	
EMPLOYMENT AND INCOME	
39. How many years on the job are required for income to be deemed stable? How many years in the line of work?	
40. What length of gap or frequency of changes in employment is regarded as a negative? Are explanations routinely requested for employment negatives?	
41. How is stable income defined?	
42. Do loan originators ask routinely for verifiable unstable sources of income, such as overtime, seasonal, etc., work?	
43. Is rent paid by household members counted as income?	
44. Do loan originators routinely ask about this?	
45. Is any or all nontaxable income to be “grossed up”?	

46. Are applicants asked routinely whether they expect their income to rise? What type of documentation is needed to establish a projected increase?	
47. How is part-time income handled?	
48. How is annuity, pension, or retirement income handled?	
49. How is income from alimony, child support, and separate maintenance handled? How is income from public assistance handled?	
PROJECTED HOUSING COSTS AND DEBTS	
50. What types of debts are included or excluded from ratio calculations?	
51. Are certain types of accounts viewed more negatively than others, for example, revolving debt?	
52. Under what circumstances would an applicant be advised to pay down debts?	
53. Would the bank specify which debts should be paid off?	
DEBT RATIOS	
54. What maximum housing debt and total debt ratios are used?	
55. What is the source or rationale for them?	
56. What would justify approving an application with a ratio higher than the requirement?	

57. Are applicants with qualifying ratios ever refused because of debt considerations?	
COLLATERAL/APPRAISALS	
58. *Are applicants advised of their right to obtain a copy of the appraisal report on their property?* Is a copy routinely provided?	
59. Does the bank employ its own appraisers?	
60. Review the guidance the bank provides appraisers, whether employed or independent.	
61. What rules govern adjustments to initial appraised values?	
62. Who reviews appraisals?	
63. When is PMI required?	
64.What does the bank do if a PMI company refuses to insure the loan?	
65. On adverse action notices and HMDA LAR "reasons for denial," does the bank report PMI denials as "denied for PMI" or does it merely repeat the substantive reason that the PMI company cited?	
GUARANTORS, ETC.	
66. Under what circumstances would a guarantor materially increase an applicant's likelihood of approval (e.g., if the applicant had bad ratios, poor credit history)?	

67. Are applicants with such weak qualifications routinely told that a guarantor would increase the likelihood of approval?	
APPLICATION PROCESS	
68. Where are applications accepted? Who handles them?	
69. If a home purchase or refinance loan, how is government monitoring information obtained to comply with Section 202.13 of Regulation B?	
70. For other loans, how are staff directed not to obtain prohibited information?	
71. If the product is covered by HMDA, when and how are data entered on the LAR?	
72. What verifications are obtained? When and how?	
73. What happens if there is a problem obtaining verifications or if they are inconsistent with the application data?	
74. Is the applicant asked for assistance or explanation?	
75. Is there a "conditional approval" stage of the process?	
76. Do files document conditions and attempts to resolve them?	
77. How long are terms locked in by a written or oral agreement?	
78. Under what circumstances are locks-ins extended?	

79. How does the bank determine whether married applicants want to apply jointly or individually?	
DENIALS	
80. Obtain a list of the reasons for denial and review it with the interviewee.	
81. How is the adverse action notice prepared? Review it with the interviewee.	
82. How does the bank document the timely provision of adverse action notices?	
83. Is there a denial review process? How does it work?	
SECONDARY MARKET CONSIDERATIONS	
84. To whom does the bank principally sell loans?	
85. Arrange to have copies of the loan purchasers' guidance available during file review.	
86. In what ways are bank standards more restrictive than loan purchasers require?	
87. What have been the lender's experiences in attempting to persuade loan purchasers to reconsider refusals to purchase?	
PORTFOLIO LENDING	
88. Does the bank lend for its own portfolio?	

89. How do the requirements for this differ from those for loans to be sold?	
90. Does the bank hold loans to "season" them until resale? What features would cause a loan to be handled this way?	
EXCEPTIONS	
91. Does the bank produce (for its management uses) an "exceptions" report listing all residential loans made that do not meet the bank's stated requirements? Obtain any such report for the period being examined in the fair lending review.	
92. At what level in the bank can loans be approved that fail to meet requirements?	
COMPENSATING/OFFSETTING FACTORS	
93. Do strong qualifications in certain areas overcome an applicant's failure to meet requirements in others?	
94. Describe specific factors that operate to overcome particular deficiencies (e.g., projected income compensates for excessive total debt ratio)?	
95. Obtain any written guidance on this.	
LOAN TERMS AND CONDITIONS	
96. How are prices set? Is there a range?	

97. Why would prices differ? Which aspects of pricing are fixed and which are discretionary?	
98. How is pricing influenced by third parties such as brokers?	
99. How are loan terms set?	
100. Why would loan terms vary?	
101. How is the down-payment set? Why would requirements vary?	
102. How are collateral requirements set? Why would requirements vary?	
103. How are escrow amounts set? Why would they vary?	
104. What fees are imposed for the product? Why would they vary?	
FILE DOCUMENTATION	
105. How are contacts with the customer documented?	
106. How are in-bank conferences (or other face-to-face encounters) with the applicant documented?	
107. What worksheets should be found in the typical file?	

Marginal Transactions

Marginal Denials

Denied applications with any or all of the following characteristics are "marginal." Such denials are compared with marginal, approved applications. Marginal denials are those that:

- Were close to satisfying the requirement that the adverse action notice said was the reason for denial.
- Were denied by the bank's rigid interpretation of inconsequential processing requirements.
- Were denied quickly for a reason that normally would take a longer time for an underwriter to evaluate.
- Involved an unfavorable subjective evaluation of facts that another person might reasonably have interpreted more favorably (for example, whether slow pays actually showed a "pattern," or whether an explanation for a break in employment was "credible").
- Resulted from the bank's failure to take reasonable steps to obtain necessary information.
- Received unfavorable treatment as the result of a departure from customary practices or stated policies. For example, if it is the bank's stated policy to request an explanation of derogatory credit information, a failure to do so for an applicant from a prohibited basis group would be a departure from policy even if the derogatory information seems to be egregious.
- Were similar to an approved control group applicant who received unusual consideration or service, but was not provided such consideration or service.
- Received unfavorable treatment (for example, were denied or given various conditions or more processing obstacles), but appeared fully to meet the bank's stated requirements for favorable treatment (for example, approval on the terms sought).
- Received unfavorable treatment related to a policy or practice that was vague, and/or the file lacked documentation on the applicant's qualifications related to the reason for denial or other factor.
- Met common secondary market or industry standards even though failing to meet the bank's more rigid standards.

- Had a strength that a prudent lender might believe outweighed the weaknesses cited as the basis for denial.
- Had a history of previously meeting a monthly housing obligation equivalent to or higher than the proposed debt.
- Were denied for an apparently "serious" deficiency that might easily have been overcome. For example, an applicant's total debt ratio of 50 percent might appear grossly to exceed the lender's guideline of 36 percent, but this may in fact be easily corrected if the application lists assets to pay off sufficient nonhousing debts to reduce the ratio to the guideline, or if the lender were to count excluded part-time earnings described in the application.

Marginal Approvals

Approved applications with any or all of the following characteristics are "marginal." Such approvals are compared to marginal, denied approved applications. Marginal approvals are those:

- Whose qualifications satisfied the bank's stated standard, but very narrowly.
- That bypassed stated processing requirements, such as verifications or deadlines.
- For which stated creditworthiness requirements were relaxed or waived.
- That, if the bank's own standards are not clear, fell short of common secondary market or industry lending standards.
- That a prudent conservative lender might have denied.
- Whose qualifications were raised to a qualifying level by assistance, proposals, counteroffers, favorable characterizations of questionable qualifications, etc.
- That in any way received unusual service or consideration that facilitated obtaining the credit.

Summary of Lending Discrimination Comparative Review

Bank: _____ Site of exam: _____
Examiner in charge of fair lending:_____
On-site from __/__/__ to __/__/__. Staff days: ____
Conclusion and recommendation: _____

BACKGROUND

Decision center(s) examined: _____
Related entities involved: _____
Market(s) examined: _____
Product(s): _____
Stage(s) of lending process: _____

Review period: __/__/__ to __/__/__.

COMPARATIVE FILE REVIEW

(Complete separately for each comparison)
Control group: _____ Prohibited basis group: _____

	Control group approvals	Prohibited basis denials	Other
Application volume			
Guide's sample range			
Sample requested			
Why adjustment			
Files reviewed			
Marginals			

Types of apparent disparate treatment discussed with bank: _____
_____
_____
_____

Other types of discrimination or illegal limitations on credit discussed with bank: ____
_____

File Review Worksheet

The following are possible ways to record some of the common types of information pertinent to comparative file analysis for possible illegal disparate treatment. These detailed data should be collected only for selected applicants. Only minimal line sheet information (as described in the procedures) is needed for applicants that are not marginal (well-qualified approvals or seriously deficient denials).

This appendix does not include a complete data collection worksheet or spreadsheet. Examiners should prepare worksheets, spreadsheets, etc., adapted to the particular product and bank being examined. Unlike HMDA and other large-scale surveys, the same data elements do not need to be obtained from each bank examined.

For joint applications, the worksheet or spreadsheet should record information on both applicants.

BASIC INFORMATION BLOCK

BANK	APPLICANT NAMES	EXAMINER
MARKET/LOCATION		DATE REVIEWED
PRODUCT	APPLICATION #	APP. DATE
PURPOSE	GROUP (PROHIBITED BASIS OR CONTROL)	ACTION AND DATE

APPLICANT FINANCIAL INFORMATION BLOCK

	This loan mo. pmt.	Total other mo. pmts.	Gross primary income	Gross other income	D/I ratios	Funds needed to close	Funds available to close
Per bank							
Per OCC							
Reason for diff.							
Employment and Years				**Net worth**			

LOAN TERMS BLOCK

AMOUNT	TERM (MONTHS)	APR	POINTS (NOT ORIGINATION FEE)
COLLATERAL	LTV/DOWN PAYMENT	GUARANTOR	OTHER FEES
MARK WITH * ANY EXCEPTIONS TO POLICY MARK WITH **C/O** ANY TERMS DIFFERENT FROM APPLICATION DUE TO COUNTER-OFFER			

CREDIT HISTORY BLOCK

Good credit

WITH THIS BANK (TYPE, AMT., PERIOD): _____

 # MONTHS MORTGAGE/RENT HISTORY: _____
 # PERFECT RATABLE ACCOUNTS: _____
 # MONTHS PERFECT CREDIT PRIOR TO APPLICATION: _____

Number of accounts with delinquencies: ___

ACCOUNT	1.	2.	3.	4.
WORST DELINQ. (#)				
MOST RECENT (DATE)				
AMOUNT				
PAID? (DATE)				
EXPLAINED? (NOTE WHETHER BANK REQUESTED EXPLANATION.)				
COMMENTS:				

DENIAL REASONS BLOCK

DENIAL REASONS	1.	2.	3.
APPLICANT'S QUALIFICATION			
BANK'S REQUIREMENT			
RELATED FACTS			

Technical or Procedural Compliance Checklist

Use copies of this **checklist** to evaluate one denied consumer, one denied business, and one denied residential real estate file, as called for in step 13b. Also, complete a copy of the checklist after comparative file review as called for in step 28 as a "debriefing" to identify any recurring or systemic violations (not to evaluate individual files). *NOTE: Citations are to Regulation B, 12 CFR 202.1 et seq., unless indicated otherwise.*

Apparent violation (if No)	Yes	No	Basis for conclusion
1. Do application forms or guidance limit information requests about a spouse or former spouse to when such a person will be contractually liable or the applicant is relying on community property, the spouse's income, alimony, child support, or maintenance payments to repay the debt (202.5(c)(1))?			
2. Do guidance and forms for unsecured individual loans include inquiries about the marital status of the applicant only when community property is involved (202.5(d)(1))?			
3. For secured loans, are inquiries into marital status no more extensive than obtaining the applicant's status as "married," "unmarried," or "separated" (202.5(d)(1))?			
4. Do guidance and forms ensure that the applicant is informed that income derived from alimony, child support, or maintenance payments need not be revealed (202.5(d)(2))?			
5. When a title, such as Ms., Miss, Mrs., or Mr., is shown on the application, does the form disclose that such designation is optional (202.5(d)(3))?			
6. Do guidance or forms exclude requests for information relative to the gender, race, color, national origin, religion or birth control, childbearing, or child rearing intentions of the applicant (202.5(d)(3),(4),(5)), except for monitoring information required by 202.13 on home mortgage loans?			
7. Does the bank furnish joint account information to consumer reporting agencies in a manner that provides access to such information in the name of each spouse (202.10(b))?			
8. When the bank responds to an inquiry for credit information regarding a particular applicant, is the information furnished under the applicant's own name (202.10(c))?			

Apparent violation (if No)	Yes	No	Basis for conclusion
9. Do application files show that the bank notified applicants: a) Of incompleteness in writing within 30 days of the date of application if the applicant has not responded to any oral request for information (202.9(c)(3))? b) Of action taken, within 30 days of receipt of a completed application (202.9(a)(1)(I))? c) Of action taken, within 30 days after taking adverse action on an incomplete application (202.9(a)(1)(ii))? d) Of action taken, within 90 days after notifying the applicant of a counteroffer, if the applicant has not accepted such alternative loan (202.9(a)(1)(iv))?			
10. Do written notices of adverse action contain: a) A statement of action taken (202.9)(a)(2))? b) A statement substantially similar to that contained in section 202.9(b)(1) of Regulation B? c) A statement of specific reasons for the action taken or disclosure of the applicant's right to such a statement (202.9(a)(2))? d) For businesses with revenues of $1million or less, written disclosure of the right to a statement of reasons (if not disclosed at the time of application).			
11. Do statements of reasons for adverse action specify the principal reasons for the action (202.9(b)(2))?			
12. Does the bank retain for 25 months after notice of action taken or notice of incompleteness (202.12(b)), the following information (as applicable): a) The application and all supporting material b) All information obtained for monitoring purposes? c) The notification of action taken? d) A statement of specific reasons for adverse action? e) Discrimination complaints under Regulation B?			

Apparent violation (if No)	Yes	No	Basis for conclusion
13. Was information relative to an investigative action retained until final disposition of the matter (202.12(b)(4))?			
14. For home purchase and refinance loans, did the bank request the following monitoring information (202.13(a)): a) Race/national origin, using the categories American Indian, or Alaskan Native; Asian or Pacific Islander, Black; White; Hispanic; Other (specify)? b) Sex? c) Marital status, using the categories married, unmarried, and separated? d) Age?			
15. Does the form used to collect monitoring information contain written notice that it is for federal government monitoring and that the bank must note race and sex on the basis of sight and/or surname if the applicant(s) chooses not to do so (202.13(c))?			
16. Does the bank note on the monitoring form applicants' refusals to disclose monitoring information (202.13(b))?			
17. Does the bank, to the extent possible on the basis of sight and/or surname, designate the race and sex of each applicant (202.13(b))?			
18. If the bank is subject to HMDA, does the bank: a) Maintain the LAR as called for in Regulation C? b) Update the LAR to the most recent quarter, within 30 days of the end of the quarter (commencing April 30, 1995, for the first quarter or 1995). (Regulation C) c) Include data on the LAR on reasons for denial (an optional provision under Regulation C made mandatory by 12 CFR 27)?			

Other Explicit Illegal Limitations on Credit Checklist

These are substantive violations for which relief must be sought for persons whose credit rights are impaired. Review the checklist before comparative file review. As the file review proceeds, note any violations observed. Complete one master checklist (not ones for individual transactions). *NOTE: Citations are to Regulation B, 12 CFR 202.1 et seq., unless indicated otherwise.*

Apparent violation (if No)	Yes	No	Basis for conclusion
1. Does the bank permit holders of open-end accounts to retain the accounts despite changes in age or marital status and despite retirement 202.7(c)(1)?			
2. Is the age of an applicant considered only to favor an applicant 62 or older (202.6(b)(2)(iv))?			
3. When evaluating the applicant's creditworthiness, does the bank ignore aggregate statistics or assumptions relative to the likelihood of bearing or rearing children (202.6(b)(3))?			
4. Does the bank count income derived from part-time employment or a retirement benefit (202.6(b)(5))?			
5. Does the bank consider income from alimony, child support, or maintenance payments when it is likely to be consistently received (202.6(b)(5))?			

Apparent violation (if No)	Yes	No	Basis for conclusion
6. Does the bank consider, at the applicant's request: a) Information from the applicant indicating that past credit performance does not accurately reflect the applicant's willingness or ability to repay (202.6(b)(6)(ii))? b) Any credit information in the name of the applicant's spouse or former spouse that demonstrates the applicant's willingness or ability to pay (202.6(b)(6)(iii))?			
7. Does the bank grant loans in maiden names or combinations of maiden and married names if requested (202.7(b))?			
8. Are signatures of spouses obtained only for situations permitted under section 202.7(d)?			
9. If jointly owned property secures the loan, are nonapplicant joint owners required to sign only instruments related to collateral (202.7(d)(4))?			
10. Is an applicant allowed to volunteer a person other than the spouse to be a cosigner (202.7(d)(5))?			

11. Did the lender use reasonable diligence to obtain the information needed to complete the application, as required by Section 202.2(f) of Regulation B?			
12. Does the bank grant credit even if credit life, health, accident or disability insurance is not available due to the applicant's age (202.7(e))?			

Organizing Information from Comparative File Review

Examiners should use the following or similar approaches to organize the comparisons of large numbers of "benchmarks" and "overlaps," reveal apparent disparate treatment, and present the material to the bank for response. The comparisons should include prohibited basis applications treated less favorably that appear as well or better qualified than control group applicants treated more favorably. Put another way, the comparison should include control group applicants treated more favorably that appear no better qualified than applicants from the prohibited basis group who are treated less favorably.

Ranking

Examiners will present the bank with a simple list of apparently disparately treated applications in rank order from best- to least-qualified for the type of qualification being compared. This type of presentation works well for a comparison involving an easily quantified qualification, such as debt-to-income ratio or length of employment.

If the factor being compared was used completely consistently, every approval would rank above every denial. Apparent disparate treatment will appear as deviations from such a pattern of total consistency, so that prohibited basis denials and control group approvals will be interspersed (will overlap) in the ranking.

Comparative Analysis Grid

The sample comparative analysis grid depicts an alternative way of presenting a ranking.

Side-by-Side Table

For each factor being compared, the less favorably treated applicants from the prohibited basis group are in one column and the more favorably treated control group applicants, in another column. This type of presentation works well for a comparison involving clearly contrasting treatment, such as waiver

of verification or giving an opportunity to explain delinquencies, although it can also be used to compare quantifiable qualifications (as the sample illustrates).

Sample Comparative Analysis Grid

Debt/income ratios

	Black Denials	Jones[1]	Joplin	Jenkins	Jackson	James	Johnson
White Approvals		41%	43%	45%	48%	50%	51%
Smith	42%	X					
Snellings	42%	X					
Slayton	43%	X	X				
Salmon	44%	X	X				
Surrey	44%	X	X				
Sales	46%	X	X	X			
Simpson	46%	X	X	X			
Saunders	47%	X	X	X			
Shaw	48%	X	X	X	X		
Short	49%	X	X	X	X		
Stewart	51%	X	X	X	X	X	X
Swanson	51%	X	X	X	X	X	X
Seville	51%	X	X	X	X	X	X

[1] *Denied black applicant Jones appears to have been treated less favorably than every apparently no-better-qualified approved white applicant marked below with an x. The bank should be asked to identify specific legitimate, nondiscriminatory differences between each denied applicant and all the approved ones marked below it.*

Sample Comparative Analysis Side-by-Side Table

Qualifications

Declined applicant	Reason for denial (benchmarks)	Approved applicant as bad or worse ("overlaps")
Appleby	"Collections, charge-offs, or liens" (paid, $125, three years ago))	Brant Bell Beals Bollinger
Archer Addison	"Insufficient credit history" (16 months)	Bruton Bagley
Abington Atkins	Irregular employment (three changes in 24 months)	Brill Bledsoe Binkley
Antwine Allen Appier	Debt/income ratio (42.5%)	Bonds Bascomb Bender Berry Belascoe

Types of assistance to qualify

Declined applicant treated less favorably	Type of favorable treatment provided selectively	Approved applicant treated more favorably
Morton	Overtime income included for D/I	Prell
Milk Mathews	Debt with less than 10 mos. remaining excluded from D/I	Payton Pratt
Menger Mathews	Explanations for delinquencies sought by lender and accepted	Palmer Pettis

Evaluating Responses to Evidence of Disparate Treatment

Examiners may find either comparative or overt evidence of disparate treatment. There are many possible explanations for such apparent treatment.

I. Responses to **Comparative** Evidence of Disparate Treatment

A bank may offer the following responses – separately or in combination – to explain that the appearance of illegal disparate treatment of applicants is misleading, and that no violation has occurred. The responses, if reliable, rebut the appearance of disparate treatment. The examiners must evaluate whether the responses are reliable.

The bank's personnel were unaware that the applicants were from a prohibited basis group.

If the bank claims to have been unaware that the applicants (or neighborhood) were from a prohibited basis group, ask personnel to show that the application in question was processed in such a way that bank staff making the decisions would not have learned of the prohibited basis.

If the product is one for which the bank maintains prohibited basis monitoring information, assume that all bank employees could have considered those facts. Make the same assumption when when any bank employee and the customer met face-to-face.

If an ordinary person could have recognized the applicant's membership in a prohibited basis group from other facts in the application (e.g., the surname can be easily recognized as Hispanic), assume that the bank's staff drew the same conclusions. If the racial character of a community is in question, ask the bank to provide persuasive evidence why its staff would **not** know the racial character of any community in its service area.

The difference in treatment was justified by differences in the applicants (applicants not "similarly situated")

Examiners must ask the bank to account for the difference in treatment by pointing out a specific difference between the applicants' qualifications, or some factor not captured in the application but that legitimately makes one applicant more or less attractive to the bank, or some unprohibited factor related to the processing of their applications. The difference identified by the bank must be one that is important enough to justify the difference in treatment in question rather than a meaningless difference.

The factors commonly cited to show that applicants are not similarly situated fall into two groups: those that can be evaluated by how consistently they are handled in other transactions, and those that cannot be evaluated in that way.

Verifying "Not Similarly Situated" Explanations by Consistency

Examiners must ask the bank to document that the factor cited in its explanation was used consistently. The appearance of disparate treatment remains if a factor cited by the bank in justifying favorable treatment for a control group applicant applies to an applicant from a prohibited basis group who was at least as qualified and who was treated **un**favorably. Similarly, the appearance of disparate treatment remains if a factor cited by the bank in justifying the unfavorable treatment of an applicant from a prohibited basis group also applies to a control group applicant no better qualified who got favorable treatment.

Among the responses that should be evaluated this way are:

- *Customer relationship.* Ask the bank to document that a customer relationship was also sometimes considered to benefit applicants from the prohibited basis group and/or that its absence worked against control group customers. *"Loan not saleable or insurable."* If file review is still in progress, be alert for loans approved despite the claimed fatal problem. At a minimum, ask the bank to be able to produce the text of the secondary market or insurer's requirement in question.

- *Difference in standards or procedures between branches or underwriters.* Ask the bank to provide transactions documenting that each of the two branches or underwriters applied its standards or procedures consistently to both prohibited basis group and control group applications it processed, and that each served similar proportions of the prohibited basis group.
- *Difference in applying the same standard (difference in "strictness") between underwriter, branches, etc.* Ask the bank to provide transactions documenting that the stricter employee, branch, etc., was strict for both prohibited basis and control group applicants and that the other was "lenient" for both, and that each served roughly similar proportions of the prohibited basis group. The best documentation the bank could provide would be applicants from the prohibited basis group who received favorable treatment from the lenient branch or underwriter and control group applicants who received less favorable treatment from the "strict" branch or underwriter.
- *Standards or procedures changed in the time between receipt of the applications being compared.* Ask the bank to provide transactions documenting that the earlier and later standards each were applied consistently to both prohibited basis and control group applicants.
- *Employee misunderstood standard or procedure.* Ask the bank to provide transactions showing that the misunderstanding applied to both prohibited basis and control group applications. If that is not available, find no violation if the misunderstanding is a reasonable mistake.

In all of the above situations, the best response the bank could make would show that the treatment in question occurred for both groups in proportion to the groups' representation among applicants.

Evaluating "Not Similarly Situated" Explanations by Other Means

If consistency cannot be evaluated, accept an explanation even without examples of its consistent use, if:

- The factor is documented to exist in (or be absent from) the transactions in question, as claimed by the bank.
- The factor is one a prudent lender would consider.
- The file review found no evidence that the factor is applied selectively on a prohibited basis (in other words, the bank's explanation is "not

inconsistent with available information").

- The lender's description of the transaction is generally consistent and reasonable.

Some factors impossible to compare for consistency may be:

- *Unusual underwriting standard*. Ask the bank to show that the standard is prudent. If the standard is prudent and not inconsistent with other information, accept this explanation even though there is no documentation that it is used consistently.
- *"Close calls."* The bank may claim that underwriters' opposite decisions on similar applicants reflect legitimate discretion that the examiners should not second guess. That is **not** an acceptable explanation for **identical** applicants with different results, but is acceptable when the applicants have differing strengths and weaknesses that knowledgeable underwriters might reasonably weigh differently. However, do not accept the explanation, if other transactions reveal that those "strengths" or "weaknesses" are counted or ignored selectively on a prohibited basis. If the number of "close calls" exceeds 30, contact CCP about the potential to use statistical analysis to determine whether there is a pattern on a prohibited basis.
- *"Character loan."* Expect the bank to identify a specific history or specific facts that make the applicant treated favorably a better risk than any treated less favorably.
- *"Accommodation loan."* A transaction may appeal to a bank for many reasons apart from the qualifications demanded by the secondary market and insurers. For example, a customer may be related to or referred by an important customer, be a political or entertainment figure who would bring prestige to the bank, be an employee of an important business customer, etc. It is not illegal discrimination to make a loan to an otherwise unqualified control group applicant who has such attributes and to deny one to a more qualified applicant from a prohibited basis group who lacks such attributes. However, be skeptical when the bank cites reasons for "accommodations" that an ordinary prudent banker would not value.
- *"Gut feeling."* Ask whether any specific event or fact generated the reaction. Often, the lender can cite a specific reason why he or she was confident or uncomfortable about the customer. No discrimination exists if it is credible that the lender considered such a

reason and did not apply it selectively on a prohibited basis. Be skeptical when lenders justify an approval or denial using a general perception or reaction to the customer. Such a perception or reaction may be linked to a racial or other stereotype that legally must not influence credit decisions.

Verifying Explanations by Follow-up Customer Contacts

If the bank's explanation of the handling of a particular transaction is based on customer traits, actions, or desires not evident from the file, consider contacting the customer to verify the bank's description. When authorized by the deputy comptroller for Community and Consumer Policy, examiners may contact bank customers to gather additional facts necessary to determine whether there is a violation. Such contacts need not be limited to possible victims of discrimination, but can include control group customers or other witnesses.

The different results stemmed from an inadvertent error.

If the bank claims an identified error, such as miscalculation or misunderstanding, caused the favorable or unfavorable result in question, evaluate whether the facts support the assertion that such an event occurred.

If the bank claims an "unidentified error" caused the favorable or unfavorable result in question, expect the bank to provide evidence that discrimination is inconsistent with its demonstrated conduct, and therefore that it is the less logical interpretation of the situation. Consider the context (as described later in the appendix).

The apparent disparate treatment on a prohibited basis is a misleading portion of a larger pattern of inconsistencies that occurred randomly, not on a prohibited basis.

Do not accept a bank's unsupported claim that otherwise inexplicable differences in treatment are distributed randomly. Ask the bank to provide counterexamples to show that the unfavorable treatment is not limited to the prohibited basis group and that the favorable treatment is not limited to the control group.

The bank's counterexamples will conclusively demonstrate "random inconsistency" if they:

- Involve the **same conduct or decisions** for which the examiners identified inconsistencies;

- Consist of (1) favored applicants from the prohibited basis group whose **degree** of deficiency is as great as or greater than that of favored applicants in the control group identified by the examiners, and (2) disfavored applicants in the control group whose **degree** of creditworthiness is as great as or greater than that of the disfavored applicants from the prohibited basis group.

- Demonstrate that, among applicants who merited or were eligible for the favorable (or unfavorable) treatment, the **proportions** of those who actually received the favorable (or unfavorable) treatment were not significantly different between the control and prohibited basis groups.

In many examinations the bank will provide only part of the documentation described in the preceding paragraph, the numbers of transactions will be too few to support a statistical inference of randomness, or there will be issues regarding whether the applicants are similarly situated or whether the types of treatment are comparable. Evaluating the sufficiency of the bank's response may be difficult. Examiners typically should consult their district's lead compliance expert when the bank raises the issue of "random inconsistency."

NOTE: In examinations in which the OCC has access to a lender's detailed, automated database (such as for many credit-scored products), the examination plan will call for analyses by OCC statistical experts to address random inconsistency issues. The issues typically will not arise from lender responses. Similarly, because the OCC's statistical modeling approach incorporates control group denials and prohibited basis group approvals rather than simply control group approvals and prohibited basis group denials, possible "random inconsistency" already is considered in the model's analysis.

Even when a bank succeeds in demonstrating that its treatment of applicants is random, examiners should inform the bank that its practices create the risk of future discrimination and raise concerns about the adequacy of its controls.

The context provides facts that contradict an inference that the bank intended to discriminate.

The examiner must consider the context when evaluating isolated, ambiguous instances of apparent disparate treatment. He or she should find no violation when circumstances contradict the interpretation that the bank intended to treat applicants from the prohibited basis group less favorably. For example, discrimination is doubtful as the cause of an isolated, ambiguous lending decision when the bank has an aggressive compliance program, clearly is open-minded toward applicants from the prohibited basis group (as evidenced by, for example, frequent loans or aggressive advertising to the prohibited basis group), and has a record of training and other substantive efforts to comply with nondiscrimination laws. However, when the facts show disparate treatment, generalities about the bank "trying hard" or being "committed to nondiscrimination" are not sufficient.

NOTE: Do not find a bank in violation solely because it lacks measures to prevent discrimination or programs that reach out to minority communities. Violations must be based on specific policies, practices, or facts about the treatment of credit seekers.

Loan Rates, Terms, and Conditions

The same analyses described in the preceding sections for decisions to approve or deny loans also apply to pricing differences. Risks and costs are legitimate considerations in setting prices and other terms and conditions of loan products. However, generalized reference by the bank to "cost factors" is insufficient to explain pricing differences. Examiners should seek additional information. If the bank:

- Claims that specific borrowers received different terms or conditions because of cost or risk considerations, ask the bank to identify the specific risk or cost differences.

- Claims that specific borrowers received different terms or conditions because they were not similarly situated as negotiators, consider seeking authorization to contact customers to learn whether the bank in fact behaved similarly with customers from prohibited basis groups

and control groups. Such information as the initial terms that the bank offered the customer and how the negotiations progressed could be valuable.

- Responds that an average price difference between the control group and the prohibited basis group is based on cost or risk factors, ask it to identify specific risk or cost differences between individual control group applicants with the lowest rates and prohibited basis group applicants with the highest that are significant enough to justify the pricing differences between them. If the distinguishing factors cited by the institution are legitimate and verifiable as described in the previous sections, remove those applications from the average price calculation. If the average prices for the remaining applicants from each group still differ more than minimally, consult with the supervisory office, the district lead expert, district counsel, and/or CCP (which may consult the E&E), as appropriate, about obtaining an analysis of whether the difference is statistically significant. Find a violation only if: (1) there is evidence of disparate treatment of similarly situated borrowers, or (2) there is a particular risk factor that meets all the criteria for a disproportionate adverse impact violation.

II. Responses to **Overt** Evidence of Disparate Treatment

Examiners may find that an explicit, formal policy employs a prohibited factor. However, many statements involving prohibited factors have legitimate explanations.

The statement was only a descriptive reference or general observation unrelated to credit decisions.

A reference to race, gender, etc., does not constitute a violation if it is merely descriptive, for example, "the applicant was young." In contrast, when the reference reveals that the prohibited factor influenced the bank's decisions or the customer's behavior, treat the situation as an apparent violation to which the bank must respond.

An apparent violation exists when a prohibited factor influences a credit decision through a stereotype related to creditworthiness, even if the action based on the stereotype seems well-intended – for example, a loan denial because "a single woman could not maintain a large house." If the stereotyped beliefs are offered as "explanations" for unfavorable treatment, regard such treatment as apparent illegal disparate treatment. If the stereotype is only a general observation unrelated to particular transactions, review that employee's credit decisions for possible disparate treatment of the prohibited basis group in question. Consider informing the bank that such views create a risk of future violations.

If negative views related to creditworthiness are described in unprohibited terms, consider whether the terms would commonly be understood as surrogates for prohibited terms. If so, treat the situation as if explicit prohibited basis terms were used. For example, a lender's statement that "It's too risky to lend north of 110th Street" might be reasonably interpreted as a refusal to lend because of race, if that portion of the bank's lending area north of 110th Street were predominantly black and the area south white.

The statement was only a personal opinion unrelated to credit decisions.

If a bank employee involved with credit availability states unfavorable views regarding a racial group, gender, etc., but does not explicitly relate those views to credit decisions, review that employee's credit decisions for possible disparate treatment of the prohibited basis group described unfavorably. If no instances of apparent disparate treatment exist, treat the employee's views as permissible private opinions. Consider informing the bank that such views create a risk of future violations.

The use of the prohibited factor is permitted by law.

Special Purpose Credit Program

If a bank claims that its use of a prohibited factor is lawful, because it is operating an Special Purpose Credit Program (SPCP), ask the bank to document that its program conforms to the requirements of Regulation B. An SPCP must be defined in a written plan that existed before the bank made any decisions on loan applications under the program. The written plan must:

- Demonstrate that the program will benefit persons who would otherwise be denied credit or receive credit on less favorable terms.

- State the time period the program will be in effect or when it will be re-evaluated.

No provision of an SPCP should deprive people who are not part of the target group of rights or opportunities they otherwise would have.

Qualified programs operating on an otherwise prohibited basis will not be cited by the OCC as a violation.

NOTE: Advise the bank that an OCC finding that a program is a lawful SPCP is not absolute security against legal challenge by private parties. Suggest that an institution concerned about legal challenge from other quarters use exclusions or limitations (such as "first-time home buyer") that are not prohibited by ECOA or the FH Act.

Second Review Program

Such programs are permissible if they do no more than ensure that lending standards are applied fairly and uniformly to all applicants. For example, it is permissible to review the proposed denial of applicants who are members of a protected class by comparing their applications to those approved applications of similarly qualified persons who are not members of the protected class to determine whether the applications were evaluated consistently.

The bank should be asked to demonstrate that the program is a safety net that merely attempts to prevent discrimination and does not involve underwriting terms or practices that are preferential on a prohibited basis.

Statements indicating that the mission of the program is to apply different standards or efforts on behalf of a particular racial or other group constitute overt evidence of disparate treatment. Similarly, there is an apparent violation if comparative analysis of applicants (those who are processed through the second review as well as those who are not) discloses dual standards related to the prohibited basis.

Affirmative Marketing/Advertising Program

Affirmative advertising and marketing efforts that do not involve application of different lending standards are permissible under both the ECOA and the FH Act. For example, special outreach to a minority community would be permissible.

Special Analyses: Disproportionate Adverse Impact, Pre-Application Screening, Marketing, Redlining, Credit-Scoring

Disproportionate Adverse Impact Violations

Consult the district lead compliance expert about whether to ask the bank to respond to a possible disproportionate adverse impact violation if **all** of the six conditions below exist. (To evaluate the possible disproportionate adverse impact of a variable in a credit scoring system, see the discussion of credit scoring systems in this appendix.)

1. A specific policy or practice is involved.

   The policy or practice suspected of producing a disproportionate adverse impact on a prohibited basis must be clear enough that the nature of action to correct the situation is obvious.

   NOTE: Gross HMDA denial or approval rate disparities do not present narrow enough issues to support disproportionate adverse impact analysis. Similarly, a bank's practice of allowing employees to exercise discretion and to negotiate terms or conditions of credit is too general for disproportionate adverse impact analysis. Broad discretion and vague standards raise concerns about discrimination, but examiners should focus on possible disparate treatment.

2. The policy or practice on its stated terms is neutral for prohibited bases.

3. The disparity on a prohibited basis is significant.

   The difference between the rate at which prohibited basis group members are harmed or excluded by the policy or practice and the rate for control group members must be large enough that it is unlikely that it could have occurred by chance. If there is reason to suspect a significant disproportionate adverse impact may exist, consult the supervisory office, the district lead compliance expert, district counsel, and/or CCP (which may consult E&E), as appropriate.

4. There is a clear causal relationship between the policy or practice and the adverse result.

   The link between the policy or practice and the harmful or exclusionary effect must not be speculative. It must be clear that changing or terminating the policy or practice would reduce the disproportion in the adverse result.

5. The rationale for the policy or practice is not clear.

   If the practice is obviously related to predicting creditworthiness, it is not a suitable target for analysis under the disproportionate adverse impact theory. That is also true when a predictive correlation between the standard and loan performance could easily be established (even if the bank has not established the correlation and does not have such documentation in hand).

   In contrast, the examiner should proceed with analysis for disproportionate adverse impact if the business necessity for the policy or practice is not clear, if it exists merely for convenience or to avoid a minimal expense, or if it is far removed from common sense or standard industry underwriting considerations. For example, the rationale is not clear for basing credit decisions on factors such as location of residence, income level (per se rather than relative to debt), and accounts with a finance company.

6. It appears that there may be an equally effective alternative for accomplishing the same purpose.

   The law does not require a lender to abandon the most effective practice for accomplishing an objective, but if alternatives are available, the lender's right to persist in using the practice with the disproportionate adverse impact is open to challenge.

If the decision made in conjunction with the lead expert is that all six elements of a disproportionate adverse impact violation appear to exist, inform the bank about the situation. Explain:

- The specific neutral standard, procedure, practice, etc., that appears to have a disproportionate adverse impact.
- The examiners' understanding of the policy.
- How the OCC learned about the policy.
- How widely the examiners understand it to be implemented.
- How strictly they understand it to be applied.
- What they understand to be the authority for it.
- The prohibited basis on which the impact occurs.
- The magnitude of the impact.
- The data from which the impact was computed.

Examiners must state that no violation exists if the practice is warranted by business necessity. Inform the bank that cost and profitability are factors the OCC will consider in evaluating the bank's business necessity. Ask the bank to describe any alternative practices it considered before adopting the one at issue.

Evaluate whether the bank's response persuasively contradicts the existence of any of the six conditions listed earlier. Consult the supervisory office, the district lead compliance expert, district counsel, and/or CCP (which may consult E&E) as appropriate.

Possible Discrimination Not Related to Treatment of Applicants

Examinations typically will not be planned to examine for pre-application screening, marketing, or geographical limitations on credit availability ("redlining") that appear to be based on prohibited factors, but if the following indications are found, the examiners should follow up as recommended.

Discriminatory Pre-application Screening

Obtain an explanation for:

- Withdrawals by applicants in prohibited basis groups without documentation of customer intent to withdraw.
- Denials of applicants in prohibited basis groups without any documentation whether qualified.
- Selectively quoting harsh terms (for example, high fees or Down

payment requirements) to prospective applicants on a prohibited basis, or quoting harsh terms to all prospective applicants but waiving such terms for control group applicants. (Evidence of this might be found in withdrawn or incomplete files.)

If the bank cannot explain those situations, consider obtaining authorization to contact the customers to verify the bank's description of the transactions. Information from the customer may help determine whether a violation occurred. Also, consider contacting the district's lead compliance expert or CCP to discuss whether the bank may be an appropriate site for the OCC's "mystery shopping" program. (Mystery shopping would occur well after the examination had concluded.)

Possible Discriminatory Marketing

Obtain an explanation for any:

- Prohibited basis limitations stated in advertisements.
- Code words in advertisements that convey prohibited limitations.
- Advertising patterns that a reasonable person would believe indicate that prohibited basis customers are less desirable.

Also, obtain an explanation for any situation in which the bank, despite the ready availability of other options in the market:

- Advertises only in media serving nonminority areas of the market.
- Uses other forms of marketing only in nonminority areas of the market.
- Markets through brokers known to serve only one racial or ethnic group in the market.

NOTE: Pre-screened solicitation of potential applicants on a prohibited basis does not violate ECOA.

Possible Racial "Redlining"

HMDA data are not sufficient to reach a reliable conclusion about whether the bank is basing lending decisions on the racial character of an area. However, repeated disparate treatment of applicants from such an area may lead to that conclusion.

Whenever there are repeated instances of apparent disparate treatment that involve minority applicants, examiners should check on whether they reside in an area or areas generally known by their racial character. Examiners should also review any denied applications of whites from the same area (for example, if the bank has provided denied applications of whites to establish "random inconsistency," examiners should check whether the property is in minority areas).

If, like the minority applicants, white applicants from the area are denied, even though they are as well qualified as approved applicants from outside the area, there is apparent disparate treatment based on the racial character of the area.

In addition, examiners can review the LAR for denials for "collateral" (HMDA denial reason #4), note the census tracts, and see whether the properties are in predominantly minority areas. If so, examiners can review some of the files to determine whether the appraisals show any irregularity, such as unexplained downward adjustments of value by the bank or adjustments for factors already discounted in the appraisal.

Credit Scoring

This discussion generally focusses on credit scoring as it applies to decisions to approve or deny applications. Although examiners will be able to identify and resolve many issues related to credit scoring by using the guidance given here, for other more complex issues and for issues related to comparative analysis of loan prices, terms, and conditions, they should consult their lead expert, who should, as needed, consult CCP, which will, as appropriate, consult statistical experts in E&E. In cases where statistical expertise is required, CCP or E&E will provide guidance and assistance as needed.

Determine whether the bank uses a credit scoring system. A credit scoring system is any numerical assessment of creditworthiness factors. Identify the factors that are scored.

NOTE: The factors themselves are not proprietary information, though how they are weighed may be.

Overt Evidence of Discrimination

If the bank uses a credit scoring system, determine whether the system makes any explicit distinctions on a prohibited basis. Such distinctions include:

- Using age as a predictive variable in a credit scoring system.
- Assigning different credit limits depending on the age of the applicant.
- Assigning different credit limits depending on the marital status of the applicant(s).

If the credit scoring system makes an explicit distinction on a prohibited basis other than age, treat that as overt evidence of discrimination and ask the bank to respond. The only permissible distinction in a credit scoring system is to consider age as long as persons over 62 are not treated less favorably than those under 62, and the scoring system is certified to be empirically derived and demonstrably and statistically sound (12 CFR 202.6 (b)(2)(ii)).

Under Regulation B, credit scoring systems generally fall into two categories: those that are "validated" – empirically derived and demonstrably and statistically sound – and those that are not. Credit scoring systems not validated are referred to as "judgmental systems." The regulatory definitions of "empirically derived, demonstrably and statistically sound" and "judgmental" are in 12 CFR 202.2 (p)(1)(I), (ii), (iii) and (iv), and 202.2 (t), respectively.

The fair lending laws permit lenders to use either validated or judgmental scoring systems, except in one situation. If the creditor uses age as a variable to predict creditworthiness or uses age-split scorecards, the creditor must have a validated scoring system. When either practice exists, examiners should document whether the scoring system is validated. (If neither practice exists, examiners need not evaluate whether the scoring system has been validated.)

A validated credit scoring system may segment the population into scorecards based on the age of an applicant. When a system uses a card covering a **wide** range that encompasses elderly applicants, the credit scoring system is not considered to be scoring age. That is so even if there is a "youth card" designation in which younger applicants less qualified than applicants 62 or older are treated more favorably. Such a system does not raise the issue of assigning a negative factor or value to the age of elderly applicants.

With the exception of applicants 62 and older, any age distinction (such as a "youth card") that affects the likelihood of obtaining credit must be based on an empirically derived, demonstrably and statistically sound relationship between that age and performance. The creditor cannot arbitrarily decide to add or subtract points based on age for nonelderly classes of applicants.

If age is scored as a predictive factor or if age-split scorecards are used, creditors must review periodically the performance of the system. Examiners should learn whether the bank has carried out such a review and whether the product that is scored has operated in a changing economic and customer environment. If so, they should have a higher expectation that the bank has carried out a review. If the bank scores age, but has not carried out a review despite changes that call the predictive value into question, consult Community and Consumer Policy.

If the scoring system does **not** use age as a factor and does **not** split scorecards by age, there is no need for fair lending purposes to expect the bank to have reviewed the performance of the system to ensure predictability or to have had it revalidated. The examiners may remind the bank that it is a good idea for the lender to review and revalidate the system, so that it operates at optimal predictability, but that is not a fair lending issue.

Comparative Evidence of Disparate Treatment

If credit scores are the sole basis for granting credit, the fact that two applicants have different scores means they are not "similarly situated." There is no disparate treatment if they get different results commensurate with the difference in scores.

Before concluding that decisions based on the credit scores are nondiscriminatory, learn from the bank:

- The steps an application goes through before and after scoring.
- How, and by whom, applicant data are obtained and characterized before being entered for credit scoring.
- Whether assistance can be given to help applicants improve data.

- The process, criteria, and authority for overrides, how override decisions are documented, and what reports are available on override activity.

- Any other way that intervention by the lender can affect the score or the outcome for the applicant.

Comparative analysis may be appropriate for pre-scoring and/or post-scoring judgments.

Credit scoring is typically associated with high volumes of applications and automated data management. Examiners should learn about the databases in which information about credit-scored applications is maintained and about what types of data are in each (particularly whether information to distinguish applicants in the prohibited basis group from applicants in the control group applicants can be combined with credit scores and scored attributes of applicants). After notifying their appropriate lead expert, examiners should contact CCP. CCP will consult with E&E if appropriate. If statistical expertise is required, CCP and/or E&E will provide guidance and assistance as needed.

Pre-scoring. The analysis will focus on whether disparate treatment occurred in how data were obtained, classified, or documented before being entered for credit scoring, and whether assistance was given selectively to improve qualifications. The scoring system may help to identify marginal applicants for such a comparison.

- Select 50 denied applicants from the prohibited basis group with scores marginally below the cutoff.

- Select 50 approved applicants from the control group with scores marginally above the cutoff.

- Compare the two groups of transactions to learn whether qualifications were characterized consistently and whether assistance was provided consistently.

If the volume of applications is large, consult CCP about assistance in selecting the sample. CCP will, when appropriate, consult E&E.

Post-scoring. Consult CCP (which will consult E&E) about developing a statistical analysis to show whether:

- Overrides were used in similar proportions within the control and prohibited basis groups.

- Overrides were applied consistently to control and prohibited basis group applications with similar characteristics.

Depending on the results of that initial analysis, examiners will be directed to review files or other records directly to determine if there are legitimate nondiscriminatory reasons for the differences.

Credit score as a judgmental factor. In an underwriting process in which a credit score is only one of several factors considered, learn what constitutes a "significant" difference between scores (that is, enough to justify a different result for otherwise similar applicants). If the scores of a denied applicant from the prohibited basis group and an approved applicant from the control group are not significantly different, and the applicant from the prohibited basis group appears as well or better qualified with regard to unscored qualifications, present the situation to the bank for response.

The bank may make the same types of responses that are discussed in "Evaluating Responses to Evidence of Disparate Treatment" in the appendix. Examiners should evaluate them in the same manner.

If the application volume is large enough (at least 50 control group approvals, 50 control group denials, 50 prohibited basis group approvals, and 50 prohibited basis group denials) to support use of the OCC's statistical modeling program, consult CCP about the potential for using a statistical model when the credit score is just one of several factors the lender evaluated judgmentally.

Disproportionate Adverse Impact

The examiner should consider whether any of the factors scored may, even if scored consistently, operate disproportionately to the disadvantage of a particular race, gender, age group, etc. Even creditworthiness variables in an empirically derived and demonstrably and statistically sound credit scoring

system may be subjected to analysis for disproportionate adverse impact. However, the scoring system vendor's certification typically will establish that such variables are related statistically to loan performance, and if a common sense relationship also exists between individual creditworthiness and the variable scored, conclude that use of the variable is justified by business necessity.

A possible exception is when a variable with little influence on the total score disadvantages applicants from the prohibited basis group quite disproportionately. Because the variable's predictive value is small, the business necessity for it presumably would be low.

Disproportionate adverse impact analysis may be particularly appropriate when a bank substitutes a variable for one found predictive by the vendor, or when the bank adjusts a score the vendor had based on demonstrably and statistically sound analysis of empirical data.

Marital Status Discrimination under the ECOA and Regulation B

ECOA generally prohibits creditors from differentiating in their evaluation or other treatment of credit applicants based solely on whether the applicants are married, divorced, separated, widowed, or single.

A creditor who routinely aggregates the incomes of married joint applicants when determining creditworthiness, but does not aggregate similarly the incomes of two unmarried joint applicants, practices marital status discrimination prohibited by ECOA and Regulation B.

In making credit decisions, creditors may not treat joint applicants differently based on the existence, the absence, or the possibility of a marital relationship between the two parties. In the case of joint credit, creditors usually require both obligors to sign a promissory note for a loan. As a result, the borrowers become jointly liable for the debt, and the creditor's rights in the event of default are the same whether the applicants are married to each other or not. If creditors choose to offer joint credit, they generally may not take either applicant's marital status into consideration in credit evaluations. Furthermore, creditors are also barred from giving weight to a marital relationship between the joint applicants.

If state property laws require the aggregation of the incomes of married joint applicants, ECOA and Regulation B are violated when a creditor does not aggregate the incomes of unmarried joint applicants.

Because a creditor can comply with both the ECOA and a state law requiring aggregation of the incomes of married joint applicants by aggregating those of all joint applicants, the existence of such a state law is not a defense to an ECOA violation. The ECOA and Regulation B include an exception to the "same treatment" rule for married and unmarried applicants when a state law affects applicants' creditworthiness because of marital status and consequently the creditor's rights and remedies in the event of default. However, state laws that require the aggregation of the incomes of married joint applicants would not fall within this exception, because such laws would not preclude a creditor from also aggregating the incomes of unmarried applicants to comply with the ECOA.

Self-Assessments by National Banks — OCC Policy

NOTE: The Economic Growth and Regulatory Paperwork Reduction Act of 1996 amended the FH Act and ECOA to make the results of "self-tests" for lending discrimination privileged if the creditor takes appropriate action to correct any identified violations. The act does not define "self-test" but directs HUD and the Federal Reserve Board to do so in. Until such regulations appear, the following OCC definitions of "self-test" and "self-evaluation" should guide national banks and examiners. If necessary, the OCC will modify this guidance.

Purpose

In April 1994, 10 federal regulatory agencies adopted and issued the "Interagency Policy Statement on Discrimination in Lending." According to that policy, "lenders should employ reliable measures for auditing fair lending compliance." The policy also stated that the agencies will consider self-testing and corrective actions as "substantial mitigating factors by the primary regulatory agencies when contemplating possible enforcement actions . . . and will consider further steps that might be taken to provide greater incentives for institutions to undertake self-assessment and self-correction."

Summary

Disclosure of Bank Fair Lending Self-Tests and Self-Evaluations

The OCC draws a distinction between self-tests and self-evaluations. In a self-test, a lender hires or otherwise arranges for "testers" or "shoppers" to pose as loan applicants. A self-test generates information that would not otherwise be available to the lender or its regulator in the normal course of business. In a self-evaluation, the lender reviews information maintained in actual loan files, Home Mortgage Disclosure Act loan application registers (HMDA-LARs), policy manuals, training materials, or audit reports. Self-evaluation includes, but is not limited to, internal file review, "second-look" programs, data analysis, and review of policy manuals and training materials. Unlike self-testing, self-evaluations are based on information about actual loan applicants and can be replicated by OCC examiners during an examination.

- Self-Tests. The OCC examiners will **not** require or request any information about a bank's self-testing program, except when the OCC independently determines that a lender has unlawfully discriminated, and the lender uses the results of self-tests to defend itself against the charge. This applies both to information about testing methods and results.

A national bank may **voluntarily** disclose to the OCC the methods or results of fair lending self-tests.

- Self-Evaluations. OCC examiners will **not** require or ask a national bank to disclose the **results** of fair lending self-evaluations, except when the OCC independently determines that a lender has unlawfully discriminated, and the lender uses the results of self-evaluations to defend itself against the charge. Examiners may request information on the policies and practices a bank employs to ensure that it does not discriminate on a prohibited basis.

  National banks may disclose **voluntarily** to the OCC the results of fair lending self-evaluations. In such cases, the OCC examiners would review the bank's policies and procedures to ensure compliance with fair lending laws, evaluate the results of the bank's fair lending self-evaluations, and conduct a limited file analysis to validate the bank's findings. This more streamlined examination would be conducted in lieu of an examination for residential lending discrimination as described in this booklet. Examiners would conduct a more extensive review of files only if they are unable to validate the bank's findings or if they identify deficiencies in the bank's policies or practices that are intended to ensure nondiscrimination in lending.

Fair Lending Violations Revealed by Self-Testing or Self-Evaluation

If a bank discovers lending discrimination, it should take corrective actions. The OCC generally will *not* take enforcement action against a bank that discovers a fair lending violation through self-testing or self-evaluation when the bank takes appropriate, timely, and complete corrective action in response. The OCC will work with any lender that voluntarily reports its fair lending violation to ensure that the lender's corrective action is appropriate and complete and to minimize the damages the bank might incur.

Although the OCC will not take enforcement action when a lender has previously taken appropriate and completed corrective measures, the agency will make referrals to the Department of Justice or notify the Department of Housing and Urban Development as required by statute or executive order. In the referral documents, the OCC will note any corrective action taken by the lender.

Components of Recommendation to Find Violation

A recommendation by the supervisory office to find any violation of discrimination laws must be forwarded to the Community and Consumer Policy Division (CCP) and be supported by:

- ☐ A description of the violation's nature, the date on which it occurred, and facts supporting the conclusions.
- ☐ Any information indicating that the violation should be interpreted as a pattern or practice.
- ☐ A recommendation that the matter be referred to DOJ and/or notice be given to HUD.
- ☐ Copies of the relevant documentation, including bank records and examiner memoranda and work papers, including a copy of the OCC's letter or draft ROE notifying the bank of the preliminary findings.
- ☐ A copy of the 30-day letter sent to the bank and a list of any other opportunities given to the bank to respond to the apparent violation.
- ☐ A summary of the bank's explanation or other responses to any violation, including a full copy of its response to the 30-day letter and any other written responses.
- ☐ A description of any harm to people, particularly whether they were denied credit or discouraged from applying or re-applying for credit.
- ☐ A recommendation on the nature and extent of any enforcement action and the relief to be sought for victims, if any, of the illegal conduct.
- ☐ If the violation involved disparate treatment, names and addresses of the victims or a description of the class of persons subjected to the illegal disparate treatment. Alternatively, if the violation involves an overtly discriminatory policy or a neutral policy with a disproportionate adverse impact, names and addresses of any persons or a description of the class of persons known to have been injured by the policy or practice. (It is not necessary to identify every individual affected.) Report your efforts to identify such persons.
- ☐ A description of any unsolicited corrective action taken by the bank, including whether it:
  - — Initiated contact with the OCC about the problem.
  - — Trained or disciplined employees (and whether this occurred before or after the OCC identified the problem).
  - — Improved its audit and supervision functions.

- Changed its policies and procedures.
- Conducted outreach to the population group whose credit was limited.
- Compensated apparent victims.

☐ A description of any exculpating evidence.

☐ Information that would assist in identifying appropriate corrective action, penalties, or relief for victims:
- The existence and effectiveness of antidiscrimination policies or other preventive features in the bank, including measures designed to detect violations, such as any discovered.
- Any history of discrimination.
- Any measures taken by the bank to correct the apparent violation.
- The bank's resources.
- Whether the violation was deliberate.
- The number of victims.
- The frequency and duration of the violation.
- The amount of actual (out-of-pocket) damages suffered by the victims.
- Whether the violation was limited to a particular office or unit or was more pervasive in nature.

☐ If the possible violation is procedural, a description of the OCC's efforts to secure compliance.

Standards of Proof for Violations and Referrals

Referable Violations

For violations of ECOA and the FH Act involving access to credit on a prohibited basis, the conclusion that there is "reason to believe" a violation occurred leads to the enforcement procedures described in the next section, "Examiner and Supervisory Roles in the Enforcement Process."

Reason to Believe

When there is "reason to believe" that a violation of discrimination laws has occurred, the OCC will cite the bank for the violation and take whatever follow-up steps are necessary and appropriate.

There is reason to believe that an ECOA or FH Act violation has occurred when a reasonable person would conclude from an examination of all credible information available that discrimination has occurred. This determination requires weighing the available evidence and applicable law. Information supporting a conclusion that there is reason to believe discrimination occurred may include loan files and other documents, credible observations by persons with direct knowledge, statistical analysis, and the bank's response to the preliminary examination findings.

Reason to believe is more than an unfounded suspicion. Although the evidence of discrimination need not be definitive or include evidence of overt discrimination, it should be developed to the point that a reasonable person would conclude that a violation exists. There may be a violation even if no specific victims are identified. (Whether there are identified victims influences the nature of the remedy, but not the finding of a violation.)

Pattern or Practice

The OCC will determine whether a "pattern or practice" is present based on an analysis of the facts in a given case. Isolated, unrelated, or accidental occurrences will not constitute a pattern or practice. However, repeated, intentional, regular, usual, deliberate, or institutionalized practices will almost

always constitute a pattern or practice. The totality of the circumstances must be considered when assessing whether a pattern or practice is present. Considerations include, but are not limited to:

- Whether the conduct appears to be grounded in a written or unwritten policy or established practice that is discriminatory in purpose or effect.
- Whether there is evidence of similar (not necessarily identical) conduct by a bank toward more than one applicant; note, however, that this is not a mathematical process, for example, "more than one" does not necessarily constitute a pattern or practice.
- Whether the conduct has some common source or cause within the bank's control.
- The relationship of the instances of conduct to one another (for example, whether they all occurred in the same area of the bank's operations).
- The relationship of the number of instances of conduct to the bank's total lending activity. Note, however, that, depending on the circumstances, violations that involve only a small percentage of the bank's total lending activity could constitute a pattern or practice. For example, if a bank makes 1,000 loans and five of them are found to be ECOA violations, there may not be a pattern or practice if each violation occurred at a different branch and involved a different loan officer. However, a pattern or practice may be found to exist if, for example, the five loans represent the only applications filed by members of the prohibited class.

Depending on the egregiousness of the facts and circumstances involved, singly or in combination, these factors could provide evidence of a pattern or practice.

Examiner and Supervisory Office Roles in Enforcement Process

Enforcement Mechanisms

The OCC has three bases for pursuing corrective action when violations of the ECOA and/or FH Act are cited:

- Referral to DOJ and/or notification to HUD as required or permitted by federal law;
- Action pursuant to the joint ECOA and FH Act Enforcement Policy Statement of 1981; and/or
- Formal or informal action from among a wide range of actions the OCC is authorized to take to correct violations of law.

Depending on the circumstances, the OCC may use more than one of these to address fair lending violations. When determining a course of action to recommend for seeking corrective action, examiners should consult with appropriate district staff members, Washington, D.C., staff members, or both.

Referrals to DOJ and Notifications to HUD

As set forth by ECOA and Executive Order 12892, the OCC will take the following actions whenever it has a "reason to believe" that the ECOA or Fair Housing Act (FH Act) has been violated:

Pattern or Practice of ECOA Violations Resulting in Discouragement or Denial: Mandatory Referral to DOJ

Whenever there is a reason to believe that a national bank has engaged in a "pattern or practice of discouraging or denying applications for credit" on a prohibited basis, ECOA requires the OCC to refer the matter to DOJ. The terms "reason to believe" and "pattern or practice" are discussed in the section on Proof Standards for Violations and Referrals earlier in this appendix. "Discouraging or denying applications" means illegal discrimination involving substantive aspects of the application and underwriting processes affecting the applicant's chances of obtaining credit on the terms sought, or discouraging potential applicants from applying for credit, or discouraging denied applicants from re-applying for credit.

In accordance with Executive Order 12892 and the memorandum of understanding (MOU) between the OCC, HUD, and the other federal bank and thrift regulatory agencies, the OCC must also notify HUD if the violations also constitute FH Act violations.

NOTE: Referral is not mandatory for ECOA violations that are not on a prohibited basis, such as failure to send adverse action notices, obtain monitoring information, or provide customers with copies of appraisal reports. Violations of the protected income provisions of Regulation B, 12 CFR 202.6(b)(5), do not trigger the referral requirement, unless they also involve discouraging or denying applications for credit on a prohibited basis.

Isolated Violations of ECOA Only: Optional Referral to DOJ

When a possible violation of ECOA is isolated, or a pattern or practice violation has not resulted in applicants being discouraged or denied, the ECOA authorizes, but does not require, the OCC to refer the matter to DOJ. These decisions will be made case by case. Optional referral of isolated instances to DOJ should be considered for possible credit discrimination not related to housing or for possible residential lending discrimination on the basis of age, marital status, receipt of public assistance, or assertion of rights under the Consumer Credit Protection Act. However, the OCC will not refer isolated ECOA violations to DOJ when the bank has taken the necessary corrective measures.

Isolated ECOA Violations That Are also FH Act Violations: Mandatory Notice to HUD

If there is reason to believe that any particular act constitutes an isolated violation of both ECOA and FH Act, ECOA and Executive Order 12892 require the OCC to notify HUD of the apparent FH Act violation. Both ECOA and the FH Act apply to discrimination in residential lending on the basis of race, color, national origin, religion, or sex. The requirement to notify HUD applies to all isolated instances of overt discrimination, disparate treatment, or disproportionate adverse impact on an FH Act-prohibited basis in residential real estate-related transactions. In its notification to HUD, the OCC will indicate whether it intends to initiate an independent enforcement action.

NOTE: HUD does not treat noncompliance with 24 CFR 110 (Fair Housing Poster) as an FH Act violation. Therefore, a bank's deficiencies in posters is not an appropriate basis for citing a bank or for notice to HUD.

FH Act Violation(s) Without Related ECOA Violation: Mandatory Notice to HUD

ECOA does not address FH Act violations that are **not** also ECOA violations, such as discrimination on the basis of familial status or handicap in residential lending. However, in compliance with Executive Order 12892, the OCC will notify HUD of such apparent violations of the FH Act. As required by Executive Order 12892, DOJ will only be notified if the violations involve a pattern or practice. When giving notice to HUD, the OCC will indicate whether it intends to initiate an independent enforcement action.

DOJ Referral and HUD Notification Matrix

Violation(s)	DOJ	HUD
ECOA only, pattern or practice of discouraging or denying applications	Mandatory	NA
ECOA only, pattern or practice (but not discouraging or denying applications)	Optional	NA
ECOA and FH Act, pattern or practice	Mandatory	Mandatory
FH Act only, pattern or practice	Mandatory	Mandatory
ECOA and FH Act, isolated	Optional	Mandatory
ECOA only, isolated	Optional	NA
FH Act only, isolated	NA	Mandatory

OCC's ECOA/FH Act Enforcement Policy Statement

Technical violations of ECOA and the FH Act are governed by the ECOA and FH Act Enforcement Policy Statement recommended by the FFIEC in 1981 and adopted by the OCC. Although that policy statement also deals with substantive violations, it was superseded for substantive violations by the April 19, 1995, memorandum from Senior Deputy Comptroller for Bank

Supervision Operations Stephen R. Steinbrink on fair lending guidance: "Responsibilities and Time Frames," which is the basis for most of this booklet's guidance on fair lending enforcement.

Other Forms of Corrective Action

The OCC is authorized to use, as appropriate, a wide range of enforcement actions, both formal and informal. For information on the types of relief available, criteria for the selection of remedies, and mitigation, see the "Interagency Policy Statement on Discrimination in Lending" (April 15, 1994). (See also "Policy for Taking Corrective Action," PPM 5310-3 (REV) and "Civil Money Penalties," PPM 5000-7 (REV).)

Enforcement Scenarios

A reviewing office in the district or Washington may disagree with the examiner's conclusion and decline to endorse the recommendation that a violation be found. That would end the matter.

On the other hand, an OCC referral to DOJ or notice to HUD may result in:

- An enforcement action by DOJ or HUD, but no OCC enforcement.
- Concurrent OCC enforcement in cooperation with DOJ.
- Enforcement by OCC alone after DOJ returns an OCC referral without action.
- Concurrent OCC enforcement in cooperation with HUD.
- Enforcement by OCC alone after notice to HUD.

The action will be determined principally by statutory requirements, OCC policy, and the responses of HUD or DOJ (if they are involved), rather than by recommendation of the examiner or supervisory office. In any case, the guidance that follows applies.

Delegated and Nondelegated Matters

At this time, final authority for enforcement decisions on most fair lending matters is held by the senior deputy comptroller for Bank Supervision Operations. Case by case, the deputy comptroller for Community and

Consumer Policy (DCCCP) may delegate to the supervisory office the handling of clear-cut fair lending enforcement cases. Otherwise, supervisory offices are not authorized, without headquarters approval, to:

- Cite in an ROE a violation of ECOA or the FH Act involving discrimination on a prohibited basis or involving the "protected income" paragraph of Regulation B (12 CFR 202.6(b)(5)); however, technical and procedural violations may be cited.
- Communicate to the bank a request for corrective action.
- Initiate an otherwise delegated enforcement action.

These restrictions will ensure the OCC's consistency in handling its fair lending responsibilities. Within the restrictions, each supervisory office may establish its own internal procedures. Purely technical violations of ECOA and Regulation B remain delegated, subject to the OCC's ECOA and FH Act enforcement policy statement previously described. The authority to assign CRA ratings remains delegated, with the following restrictions.

Reports of Examination

If examiners recommend that a violation be found, the fair lending and CRA portions of the ROE must not be issued until a final determination has been made. Other portions of the ROE can be completed and presented to the bank, but they must state clearly that the fair lending and CRA portions remain open and under review.

Internal OCC Consultation

When apparent lending discrimination has not been adequately explained or rebutted by the bank, the examiners must consult their manager. Also, they should consult district counsel, their lead compliance expert, and CCP.

OCC Consultation with HUD and/or DOJ

Examiners and supervisory offices should not contact HUD or DOJ directly. If general discussion of fair lending questions is needed, CCP or the Enforcement and Compliance (E&C) or Community and Consumer Law (CCL) Divisions in the Law Department may contact HUD or DOJ. However,

authorization from the Washington Supervision Review Committee (SRC) is necessary for contacts to discuss specific potential referrals or notices.

Examiners may be made available to HUD or DOJ for follow-up investigations or enforcement actions by those agencies following referral or notice.

Communications with the Bank

Examination Exit Meeting

Throughout the examination, the examiners will have discussed potential violations with bank management and solicited responses, as described in the Fair Lending Examination Procedures. If the examiners decide to forward the matter to the supervisory office with a recommendation that it be treated as an apparent violation, they should advise the bank of that conclusion at the exit meeting. They should stress the preliminary nature of the findings and that they are subject to further review, and inform the bank that other OCC offices reviewing findings and recommendations may request the examiners to obtain additional information from the bank.

They should also inform the bank that a 30-day letter (described as follows) will be sent to it, if such letter is not delivered at the exit meeting.

30-Day Letter

If, after considering all the relevant information and making the necessary consultations, examiners conclude that a fair lending violation appears to have occurred, the bank's management or board must be informed by letter of the preliminary findings. The letter must explain the rationale for the findings, stress their preliminary nature and the fact that they are subject to further review, and inform the bank that, if it wishes to respond, it must do so in writing within 30 days of the date of the letter. The objectives of a 30-day letter include: presenting the issues unambiguously to the bank, so that any subsequent OCC action is not delayed by the bank's claims that it did not understand the issues; and obtaining in reply a record of the bank's response to the issues, so that the OCC can distinguish whether later responses and appeals repeat those already made by the bank and evaluated by OCC.

Whether to send a 30-day letter is a supervisory office decision. A copy of the letter must be sent to the deputy comptroller for Community and Consumer Policy by facsimile transmission or overnight delivery.

Supervisory offices should be mindful that sending a 30-day letter commences a 60-day deadline for the district SRC to determine whether there is reason to believe a violation exists and, if that is the determination, to submit an appropriate recommendation for Washington SRC to consider. If the letter and/or the likely reply to it threaten to be difficult to evaluate because of unresolved factual issues, the supervisory office should investigate them before a 30-day letter is sent. The 30-day letter should be sent after the supervisory office believes it has received and evaluated all relevant information. In particularly complex situations, the supervisory office may request an extension of time.

Appropriate OCC managers or staff may meet with bank representatives to clarify or discuss the issues or the bank's response. If the bank's response to the 30-day letter does not satisfactorily explain an apparent fair lending violation, the supervisory office should inform the bank of such recommendation.

Advice Regarding Status/Progress of Pending Referral or Enforcement

If, after the on-site examination ends, the bank asks the examiner the status of the recommendation that a violation be found, the examiner should refer or direct the bank to contact the supervisory office.

Formal Notice of Referral

Formal notice to the bank that referral has been made to DOJ and/or notice sent to HUD will come from the senior deputy comptroller for Bank Supervision Operations.

Advice on Corrective Action

Examiners should not request specific corrective action for the apparent violations. They may discuss with the bank possible corrective action, but must clarify that they cannot state an opinion as to whether any corrective action is sufficient. If the violations are related to specific policies and

procedures, the examiners should advise the bank on the policies at issue and be prepared to discuss alternatives.

Advice on Future Compliance

Examiners should inform the bank of any policies or practices that might be challenged by other organizations in private lawsuits or enforcement actions even though current evidence does not merit citing a violation.

Supervisory Office Determination

Within 60 days after the issuance of the 30-day letter to the bank, the supervisory office shall determine whether there is reason to believe that a fair lending violation has occurred. The determination shall be made by the district supervision review committee (DSRC) if the bank is district-supervised, or by the appropriate deputy comptroller for Large Banks or director for Special Supervision/Fraud if the bank is not delegated. By the 60th day, the supervisory office must either:

- Inform the DCCCP it has determined that a fair lending violation did not occur;
- Inform the DCCCP it is requesting a case-by-case delegation, because a clear-cut violation of fair lending laws has occurred;
- Forward to the DCCCP a recommendation that a violation be found; or
- For good cause, submit to the DCCCP a written request for an extension of time.

Contacts with Apparent Victims

When notices to HUD of apparent violations of the FH Act are required by ECOA, the OCC must notify customers of their possible legal rights. This notice will come from the senior deputy comptroller for Bank Supervision Operations.

Contacts with Customer-Witnesses

Examiners must not identify to the bank customers who were or will be contacted as potential witnesses. If informing the bank of the contact is likely to make the identity of the witness known to the bank, the bank should not be informed of the contact.

CRA Rating

Illegal discrimination must be considered in assigning an overall CRA rating. As noted previously, when there are apparent violations, the CRA portion of the ROE must be held open pending headquarters review of the possible discrimination violations.

The existence of illegal lending discrimination should be a significant factor in a bank's CRA evaluation, but examiners must also consider many other factors related to the nature of the violation, the bank's efforts to prevent or correct it, and its other CRA activities. The ROE and public evaluation must support the rating, including how any discrimination was weighed by the examiners in assigning the rating.

When a bank requests that the OCC consider the contribution of its affiliated mortgage company in helping to meet the credit needs of its community, the supervisory office should also consider the fair lending performance of the mortgage company.

Corporate Applications

The existence of fair lending concerns does not alter the delegations for corporate applications; nor are they necessarily to be delayed until the close of the associated examination(s). Supervisory office licensing staff have been instructed to alert Bank Organization and Structure (BOS) when they become aware of unresolved fair lending concerns at a bank with a pending application (or whose affiliate has a pending application). The supervisory office remains responsible for processing the application, but consults with BOS about the impact of fair lending concerns on the application.

Policies and procedures in this area continue to be developed. Examiners and other supervisory offices should consult BOS and CCP when potential fair lending violations are found at a bank with corporate applications pending.

No Violation

If any reviewing official or authority in OCC Headquarters decides not to cite a violation, CCP will return the materials to the supervisory office with an explanation of why the facts were deemed not to constitute a violation.

ECOA and FH Act Enforcement Policy Statement (1981)

NOTE: With regard to substantive violations, this statement has been superseded. See "Examiner and Supervisory Office Roles in Enforcement Process" in this appendix.

Coordination among the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the National Credit Union Administration, and the Office of the Comptroller of the Currency (hereafter referred to as the "agencies") is desirable to enforce the Equal Credit Opportunity Act and the Fair Housing Act. The following policy statement is intended to encourage uniformity in the agencies' administrative actions that result from violations of the acts. The Office of Thrift Supervision has elected not to participate in this joint policy statement because it believes its existing policies are both sufficient and compatible with the joint statement.

Supplementary Information. This enforcement policy statement is issued pursuant to the enforcing agencies' authority under the Equal Credit Opportunity Act (ECOA) (15 USC 1691, *et seq*.), the Fair Housing Act (42 USC 3601, *et seq*.), and section 8(b) of the Federal Deposit Insurance Act (12 USC 1818(b)) for the Board of Governors of the Federal Reserve System, the Comptroller of the Currency, and the Federal Deposit Insurance Corporation; and under the Federal Credit Union Act (12 USC 1786(e)(1)) for the National Credit Union Administration.

The agencies believe it appropriate to remind institutions of their responsibilities under these laws and that the agencies will vigorously enforce them. Creditors must institute procedures to assure that all violations of the acts, including those not cited in this policy statement, will not recur. In addition, failure to comply with certain specific provisions of the acts has been judged by the agencies to be particularly serious and usually to warrant retrospective action to correct the condition resulting from the violations.

Enforcement Policy Statement on Equal Credit Opportunity Act and Fair Housing Act

This enforcement policy statement ensures that the rights of credit applicants are protected by requiring creditors to take corrective action for certain, more serious past violations of the Equal Credit Opportunity Act and Fair Housing

Act as well as to be in compliance in the future. In an effort to achieve that objective, the agencies will encourage voluntary correction and compliance with the acts. Whenever violations addressed by this policy statement are discovered, the creditor will be required to take action to ensure that such violations will not recur and to correct the effects of violations discovered.

The agencies will generally require the creditor to take action to correct conditions resulting from violations occurring within 24 months previous to the discovery of violations by an agency. An exception is violations concerning adverse action notices for which corrective action will be required for violations occurring within six months prior to discovery.

Violations in the following areas are considered serious by the agencies and will usually be subject to retrospective corrective action:

- Discouraging applicants on a prohibited basis in violation of the Fair Housing Act or 202.4 or 202.5(a) of Regulation B.
- Using credit criteria in a discriminatory manner in evaluating applications in violation of the Fair Housing Act or 202.4 through 202.7 of Regulation B.
- Imposing different terms on a prohibited basis in violation of the Fair Housing Act or 202.4 or 202.6(b) of Regulation B.
- Requiring co-signers, guarantors or the like on a prohibited basis in violation of 202.7(d) of Regulation B
- Failing to furnish separate credit histories as required by 202.10 of Regulation B.
- Failing to provide an adequate notice of adverse action under 202.9 of Regulation B.

This policy statement will not:

- Preclude the use of any administrative authority that any of the agencies possess to enforce these laws.
- Limit the agencies' discretion to take other action to correct conditions resulting from violations of these laws.
- Preclude referral of cases to the Attorney General.
- Foreclose a credit applicant's right to bring civil action under the Equal Credit Opportunity Act or Fair Housing Act or to file a complaint with the Department of Justice or the Department of Housing and Urban

Development for violations of housing laws.
- Supersede or substitute for any regulations or enforcement policies issued by any of the agencies or the Department of Housing and Urban Development under the Fair Housing Act.

Part I

This document supplements and expands upon the enforcement policy statement on the Equal Credit Opportunity Act and Fair Housing Act that was recommended by the Federal Financial Institutions Examination Council (FFIEC) on September 10, 1981, and adopted by the Comptroller of the Currency.

The policy statement was issued to national banks to remind them of the seriousness of certain violations of the two acts and to inform them that such violations will be dealt with by the agency retrospectively as well as prospectively. This document provides guidance by describing various actions for correcting the following substantive violations:

- Discouraging applicants on a prohibited basis.
- Using credit criteria in a discriminatory manner in evaluating applications.
- Imposing different terms on a prohibited basis.
- Requiring co-signers, guarantors and the like, on a prohibited basis.
- Failing to maintain and furnish separate credit histories.
- Failing to provide proper adverse action notification.

The OCC generally will use those actions described in Part II of this document, as appropriate, to correct the conditions caused by the violation. However, if the OCC believes that different corrective action would be more suitable, this policy does not preclude our discretion to use it.

This policy provides guidance for correcting both the conditions and practices resulting from violations of the acts. When violations of the acts addressed by the policy statement are discovered, the institution should be required to adopt a written compliance program to ensure that they will not recur. The program normally should include employee training in the requirements of the acts and the establishment of an internal controls program. The institution

may be required to include a written loan policy or written appraisal standards in the compliance program should the violations of the acts so warrant.

Part III of this document contains three examples of how this policy might be implemented.

Part II

1. *Discouraging Applicants on a Prohibited Basis in Violation of the Fair Housing Act, or Section 202.4 or 202.5(a) of Regulation B.*

When this violation is discovered, the institution should be directed to adopt, in consultation with the enforcing agency, a program to reverse and overcome the effects of those practices by the institution that have limited participation in its credit programs by the discouraged group.

Each program normally should be tailor-made and designed to increase applications from the discouraged group.

The program should include an in-house training program and such marketing techniques as are necessary to encourage or solicit applications from the discouraged groups. Among the techniques that have proven successful are:

- Advertising in appropriate media, particularly through the depiction of members of the discouraged group as successful applicants.
- Establishing new business relationships with real estate brokers, automobile dealers, or other arrangers of credit who generally service the discouraged group.
- Sending direct mailings to members of disfavored classes.
- Contacting representative community groups to be employed in the credit evaluating process.
- Sponsoring credit education programs.

If specific individuals have been identified who have been discouraged on a prohibited basis from applying for credit, the institution should be required to send to all such discouraged applicants a notice that contains:

- The solicitation of a (new) application.
- A disclosure that the applicant has 60 days in which to (re)apply.

2. *Using Credit Criteria in a Discriminatory Manner in Evaluating Applications in Violation of the Fair Housing Act or Sections 202.4 through 202.7 of Regulation B*

When this violation is discovered, the institution should be required to identify all applicants affected by the discriminatory standard(s) within the 24-month period prior to discovery of the violation by the enforcing agency.

These applicants will be sent a notice that includes:

- The solicitation of a new application by the institution.
- Disclosure that the applicant has 60 days in which to reapply.
- A description of the conditions under which any refund or reimbursement will be made.

In addition to the above customer notification requirements, the institution should be instructed to notify any party it previously informed of the rejection and inform that party to correct the applicant's credit history by deleting the previously reported rejection.

The institution should be required to offer to refund any fees or costs associated with submitting or processing the original application in the notice. This refund offer should include, at a minimum, application, appraisal, prepaid, and credit card check fees. Upon reapplication, the institution should not be allowed to require applicants to pay fees or costs associated with submitting or processing the new application. Such fees may be charged, however, if the application is approved. The sum of those fees must be the lesser of the total in effect at the time of original application or current charges.

In evaluating borrowers' applications, the institution should be directed to use the creditworthiness standards in effect at the time of the original applications, absent any discriminatory elements, or those currently in effect, whichever are more favorable to an applicant.

If the new applications are approved and are for credit other than open-end, the terms offered will be those currently in effect or those in effect at the time of the original applications, whichever the agency deems most appropriate.

If applicants reapply and new applications are approved, but the applicants have obtained alternative credit in lieu of that denied on a prohibited basis, the agency will consider requiring the creditor to refund fees and costs required by subsequent creditors to pay off the alternative credits. For applicants who have not obtained alternative credit, the agency should require that the costs for submitting and processing new approved applications will be the lesser of the total currently being charged by the institution or the total in effect at the time of the original applications.

The institution should be allowed to terminate the reapplication offer if it does not receive a reapplication within 60 days.

3. *Imposing More Onerous Terms on a Prohibited Basis in Violation of the Fair Housing Act or Section 202.4 or 202.6(b) of Regulation B.*

When this violation is discovered, the institution should be required to identify all such loans and notify consumers within 60 days of the corrective action. The institution should be required to offer to substitute nondiscriminatory terms for any terms illegally required and reimburse applicants for any money illegally required.

When the institution has improperly imposed a higher annual percentage rate, higher finance charges, insurance, or other loan fees, such as points on a real estate loan, the institution should be instructed to reimburse consumers the money illegally required.

When the institution has imposed other more onerous terms, such as requiring higher down payments, shorter maturities, or stricter collateral requirements, it should be instructed to offer to change the account from the terms illegally required to the terms for which the applicant should have qualified. The institution should be instructed that no fees for processing such changes may be assessed, and that the offers must state that fact.

The method for reimbursement to applicants should be the lump sum or the lump sum/payment reduction method, at the institution's option. In the case

of a loan which is in default, the institution should be instructed to reduce the balance with any monies illegally required.

4. *Requiring Co-signers on a Prohibited Basis in Violation of Section 202.7(d) of Regulation B*.

When this violation is discovered, the institution should be instructed to identify all affected applicants and release additional parties where appropriate. The institution should be instructed to absorb any cost associated with the illegal requirements, such as recording or filing fees, or fees for consumer reports, imposed on applicants by the institution or by any third party in connection with the illegal requirement.

If an applicant was individually creditworthy, but a cosigner, guarantor, or other additional party was required in violation of the act, the institution should be directed to notify all parties that the additional party will be released unless other instructions are received within 30 days from the parties to the debt. The notice of release should be sent to all contractually liable parties.

If an additional party was necessary to support the extension of credit requested, but the institution restricted the applicant's choice of parties on a prohibited basis, the institution should be directed to include in the notice sent to all parties that the applicant may substitute a creditworthy party to provide the necessary support to maintain the extension of credit. The notice also should state that the additional party originally required will be informed of the effective date of the release, provided a suitable substitute is found. The institution should be instructed that the offer to accept another party should remain in effect for at least 60 days. If an applicant was individually creditworthy, but was rejected because of inability or unwillingness to furnish a co-signer, guarantor, or other additional party required by the institution in violation of the act, the appropriate remedy is provided in No. 2 above.

If an additional party was necessary to support the extension of credit requested, and the applicant offered a financially responsible party but was rejected because of inability or unwillingness to furnish an alternative party or particular additional party specified by the institution in violation of the act, the appropriate remedy also is provided in No. 2 above. If any changes to the account are made regarding the co-signer, guarantor, or other additional

parties, the institution should be directed to report them to the appropriate consumer reporting agency.

5. *Failing to Furnish Separate Credit Histories for Married Persons in Violation of Section 202.10 of Regulation B*.

When this violation is discovered, the institution should be instructed to identify all affected applicants and take the following corrective actions as appropriate within 30 days: 1) designate joint accounts to reflect the participation of both spouses and comply with the requirements of section 202.10(a)(2) and (3); 2) notify consumer reporting agencies to which it has furnished credit information of the separate credit histories improperly or inaccurately and request them to amend their records to reflect such histories properly; and 3) notify the account holder that this information was not reported accurately, that it may have been the cause of a credit denial from other creditors, and that if credit was denied on the basis of an insufficient or nonexistent credit history or credit file, the applicant may want to reapply.

If the institution has failed to obtain sufficient information for accounts held by married persons, the institution should be directed to request the necessary information it lacks within 30 days.

Upon receipt of the information, the institution should be instructed to take the reporting and notification actions specified in the preceding paragraph.

6. *Failing to Provide Notices of Adverse Action in Violation of Section 202.9 of Regulation B*.

If the institution has failed to send notices of adverse action to applicants against whom adverse action has been taken, the institution should be directed to identify such applicants and send adequate adverse action notices.

If the institution has failed to provide an adequate notice of adverse action or has failed to provide an accurate statement of the reasons for denial to applicants against whom adverse action has been taken, the institution should be directed to send an adequate adverse action notice to all affected applicants.

The corrective action time period for violation of this section is six months prior to the discovery of the violation.

[Part III, “Case Studies,” is omitted.]

Equal Credit Opportunity

15 USC 1691	Equal Credit Opportunity Act
12 CFR 202	Equal Credit Opportunity Regulation
OCC 95-32	Equal Credit Opportunity Act (ECOA)– Official Staff Interpretation
Memorandum from Senior Deputy Comptroller for Bank Supervision and Operations (4/19/95)	Fair Lending Guidance: Responsibilities and Timeframes

Fair Housing

42 USC 3601-3619	Civil Rights Act of 1968
24 CFR 100-110	Fair Housing Regulation
BB 92-17	Guide to Fair Mortgage Lending
BB 93-30	Joint Statement on Fair Lending Expectations
BC 263	National Bank Fair Lending Efforts
OCC 94-30	Discrimination in Lending – Interagency Policy Statement